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AND

GENERAL LAND OFFICE

IN

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FROM JANUARY, 1896, TO JULY, 1896.

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* For "material," in sixth line from bottom of page 679, read *immaterial*.

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

DESERT LAND ENTRY—ASSIGNMENT—CITIZENSHIP.

NEVADA SOUTHERN RY. CO.*

Under the provisions of the act of March 3, 1891, the assignee of a desert entryman is not required to be a resident citizen of the State or Territory in which the land is situated. It is sufficient in such case if the assignee is a citizen of the United States.

A corporation organized under the laws of a State is in contemplation of law a citizen of the United States, and, as such, can take and hold by assignment a desert entry.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 30, T. 9 N., R. 23 E., Los Angeles land district, California.

The record shows that on December 14, 1893, the local officers transmitted to your office the assignment by F. L. Morgan, a native born citizen of the United States, who had made desert land entry of the above described tract, to the Nevada Southern Railway Company, a corporation organized in Colorado, together with the first yearly proof.

Your office on April 7, 1894, refused to recognize the assignment, as the company is a foreign corporation.

Sections 5 and 7 of the amendatory act of March 3, 1891, both give the entryman the right to assign at any time prior to final proof, but do not place any qualifications upon the assignee.

In *ex parte* Fred W. Kimble (20 L. D., 67), it was held, *inter alia* (syllabus):

Under the provisions of said act the assignee of a desert entryman need not show on final proof that he is a resident citizen of the State or Territory in which the land is situated. It is sufficient in such case for the assignee to show that he is a citizen of the United States.

* Not reported in Vol. XXI.

In the circular of January 26, 1894 (18 L. D., 31), however, it was said:

In the matter of the assignment of desert land claims, as recognized by the act of March 3, 1891 (26 Stat., 1095), I have to advise you that this Department, in the construction of said act, holds that the assignee must possess the qualifications required of the original applicant in the matter of citizenship and residence in the State or Territory in which the land claimed is situated. See 14 L. D., 565.

You will, therefore, require the assignee, whenever the assignment of a desert claim is filed in your office, to show the qualifications exacted of an original applicant under the desert land law, in these particulars, and advise him that if he fails, within thirty days from notice, to make the showing required, that his assignment will not be recognized. All assignments filed, however, should be forwarded to this office with due report of action thereon.

In the case, *supra*, in criticising this circular, it was said, page 70 of the opinion:

After more mature deliberation on this subject, I am disposed to think these instructions take too narrow a view of the statute, and so far as applied to this question of citizenship, are erroneous.

From what has been said hereinbefore in regard to the word "entry," as used in the statute and amendment, it will be seen that it applies only to the original entry, and that the qualifications of those entitled to make entry as prescribed in section 8 do not include the assignees of any original entryman in the matter of making final proof. It will be observed that in section 7 is found the method to be pursued to obtain patent. It provides that at any time within four years upon making satisfactory proof of the reclamation and cultivation of the land to the extent expressed; "that he or she is a citizen of the United States," and on payment of the additional sum, patent may issue "to the applicant or his assigns."

Congress contemplated an assignment of these desert land entries. The object of making this class of entries an exception to the unvarying rule—except as to coal entries—can be readily understood. It is a matter of common knowledge that the effecting of a thorough or sufficient reclamation of desert lands in many instances involves the erection of permanent dams or reservoirs for the purpose of storing the water in the season when at flood, and the construction of canals for carrying the water many miles in length. From these canals lateral ditches must be run to the particular tracts to be irrigated. All this means permanent structures on exact grades to prevent washing; headgates wherever the lateral ditches leave the main canal, constructed accurately to avoid waste, and so that the quantity of water required may be exactly measured. It is needless to say, perhaps, that all this requires a greater amount of capital oftentimes than can be furnished by the residents in the desert country. To induce those of our people who have the money to further these great enterprises, Congress wisely provided that these desert entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these waterways might be assured of some compensation for their outlay. If the construction heretofore placed on this act is to prevail, that the assigns must also be resident citizens of the State or Territory where the land is located, it might defeat the object Congress had in view.

I have thus quoted *in extenso* the opinion in the Kimble case, as it clearly sets forth the reasons for the change from the holding of the Department as set forth in the circular under discussion. It is evident, therefore, that it is not necessary that the assignee should be a resident citizen of the State in which the land is situated. The latter

portion of the syllabus, *supra*, is as follows: "It is sufficient in such case for the assignee to show that he is a citizen of the United States."

Can a railroad company be a citizen within the meaning of the law?

In *Daily v. Marquette, Houghton and Ontonagon R. R. Co. et al.* (19 L. D., 148), it was held (syllabus), *inter alia*:

A corporation organized and existing under the laws of a State, is in contemplation of law a citizen of the United States, and as such entitled to invoke the confirmatory provisions of section four, act of March 3, 1887.

In *Louisville R. R. Co. v. Letson* (2 How., 497, page 558,) the supreme court decides:

That a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purpose of its incorporation, capable of being treated as a citizen of that State, as much as a natural person.

See also *Minneapolis and St. Louis Railway Company v. Beckwith* (129 U. S., 26).

There is no danger under this construction of the law of corporations taking by assignments large tracts of land, inasmuch as section 7 of the amendatory act provides,

but no person or association of persons shall hold, by assignment or otherwise, prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands.

My conclusions are that it is not necessary for an assignee to be a citizen of the State in which the land lies, nor, in the absence of statutory requirements, that the assignee must show the same qualifications as the original entryman, a natural person.

I am, therefore, of opinion that the Nevada Southern Railway Company, a corporation organized under the laws of Colorado, can take and hold, by assignment, the desert entry of Morgan.

Your office decision is reversed.

ABANDONED MILITARY RESERVATION—HOMESTEAD.

GEORGE DELIUS.

Residence on a tract within a military reservation that is subsequently abandoned, acquired by one while employed as custodian of said reservation does not confer a right of entry under the proviso to section 2, act of July 5, 1884.

Secretary Smith to the Commissioner of the General Land Office, January 4, 1896. (W. A. E.)

The land here involved, commonly known as Greenwood Island, and described as fractional parts of sections 18 and 19, township 8 S., range 5 W., St. Stephen's meridian, Mississippi, was purchased by the United States, on August 2, 1848, from Jacob Baptist and wife, for military purposes, and remained a military reservation from that time until

December 18, 1890, when it was turned over to the Department of the Interior for disposal under the provisions of the act of July 5, 1884 (23 Stat., 103).

September 19, 1894, George Delius applied to enter said tract as a homestead (presumably under the proviso to the second section of said act of July 5, 1884), claiming residence thereon since February 1, 1883.

This application was transmitted to your office without action by the register and receiver, and was rejected by your office on November 22, 1894, for the reason that

Sec. 2 of the act of July 5, 1884, providing for entry under the homestead laws by settlers on land turned over to the Interior Department for disposal, expressly provides that such lands must have been subject to entry under the public land laws at the time of their withdrawal. The island in question was purchased by the United States for the purpose of creating a military reservation and was not public land, subject to disposal as such, on August 2, 1848, and is not therefore subject to homestead entry under said act of July 5, 1884.

Delius' appeal from your action brings the case before the Department.

It is not necessary here to pass upon the question as to whether this land was subject to homestead entry under the proviso to the second section of the act of July 5, 1884, as this office is in receipt of official information from the War Department to the effect that

George Delius was appointed custodian of the military reservation of Greenwood Island, Mississippi, by the Secretary of War, June 18, 1884, to serve without pay. His duties consisted principally in keeping squatters off the reservation, encroachments being constantly made by claimants to the property.

The proviso to the second section of the act of July 5, 1884, reads as follows:

Provided, That any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith, for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions.

Delius' residence upon this land being that of a duly appointed government agent, charged with the duty of keeping trespassers off the reservation, it can not be said that he settled thereon "in good faith for the purpose of securing a home and of entering the same under the general laws," and consequently he is not entitled to enter this land as a homestead under the proviso to the second section of said act.

Your office decision rejecting his application is affirmed.

LAMBERT *v.* LAMBERT.

Motion for review of departmental decision of September 23, 1895, 21 L. D., 169, denied by Secretary Smith, January 4, 1896.

FINAL PROOF—PUBLICATION OF NOTICE.

NORTHERN PACIFIC R. R. CO. v. KEHOE.

Notice of intention to submit final proof will be held good as against a railroad company, where, in the publication thereof, the "general land agent" of the company is specially cited, and a protest against the proof is subsequently filed by said agent, and no exception is taken therein as to the service of said notice, nor objection made thereto on appeal.

Secretary Smith to the Commissioner of the General Land Office, January 4, 1896. (F. W. C.)

I have considered the appeal of the Northern Pacific Railroad Company from your office decision of August 6, 1894, holding for cancellation its indemnity selection covering the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 2, 3, 4 and 5, Sec. 15, T. 12 N., R. 7 E., Vancouver land district, Washington, on account of the settlement claim of Patrick Kehoe.

This tract is within the indemnity limits of the grant for said company and was included within its list of selections filed October 27, 1891.

On November 11, 1891, Patrick Kehoe was permitted to make homestead entry of this land, and on February 9, 1892, notice was published of his intention to make final proof on April 6, 1892.

In this notice Paul Schulze, general land agent for said company, was specially cited. On March 8, 1892, said Paul Schulze filed on behalf of the company a protest against the proof proposed to be submitted by Kehoe in which a superior claim on account of the grant was set up. At the date of the offer of proof no appearance seems to have been made by the company.

This proof shows that Kehoe made settlement upon the land in July, 1886; that on the 10th of that month he built a house and has since made valuable improvements, valued at the time of the offer of proof at \$800, and that from the date of settlement to the time of his offer of proof he had continued to occupy, claim and improve the land.

The company's protest was dismissed April 11, 1892, and the same day certificate was issued on Kehoe's proof. The company's appeal to your office resulted in the decision of August 6, 1894, which sustained the action of the local officers holding that as the land was within the indemnity limits the company could acquire no right thereto until duly selected, and as Kehoe had settled upon the land prior to the company's selection his settlement claim was sufficient to bar the right of selection in the company, which selection was, as before stated, held for cancellation.

The company has appealed from your office decision and in a brief filed by resident counsel it is stated:

Without entering into a discussion as to the right of Kehoe to settle upon this land while it was withdrawn, nor his failure to make entry until after the company's selection, it is sufficient to note that in his published notice he fails to specially cite

the company to appear at the time of his final proof. Under such circumstances the Commissioner was in error in considering such proof and the same must be returned for new publication.

In view of the recitation in this opinion in the matter of notice given by Kehoe and the action of the company based thereon in entering its protest, it would seem that some mistake has been made by counsel, or that careful examination was not made of the record.

As before stated, in the published notice Paul Schulze, the general land agent of the company, was cited to appear and under such notice he duly filed a protest on behalf of the company against the acceptance of the proof proposed to be offered by Kehoe setting up an adverse claim in the company under its grant. There was no objection made to the manner of service in this protest, and the same was dismissed because the proof as offered showed a superior claim in Kehoe.

Neither in the appeal from the action of the local officers, nor in the specification of errors in the appeal filed from your office decision, is any exception taken to the sufficiency of the notice given by Kehoe at the time of his offer of proof.

From a review of the matter I am of the opinion that the notice was sufficient and as the proof shows a superior claim in Kehoe, your office decision is affirmed and the company's selection will be canceled.

PRACTICE—APPEAL—RULE 48 OF PRACTICE.

WRIGHT *v.* BRYAN.

To justify the finality as to the facts, provided for under rule 48 of practice, the findings of the local officers must be positive and unequivocal, not argumentative or presumptive.

Secretary Smith to the Commissioner of the General Land Office, January 4, 1896. (G. C. R.)

Thomas L. Bryan has filed a motion for review of departmental decision of October 1, 1895 (unreported), which affirmed the judgment of your office, dated May 7, 1894, holding for cancellation his mineral entry No. 256, made September 7, 1892, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 15 S., R. 70 W., Pueblo, Colorado.

It appears that on November 18, 1892, Fred. L. Wright, in behalf of himself and others, alleged occupants of the land, and intending to claim the same as a townsite, filed a protest against said mineral entry, charging, among other things, that five hundred dollars in labor and improvements had not been expended upon the claim prior to obtaining receiver's receipt therefor.

Upon the hearing the register and receiver found that contestee had complied with the law, and accordingly recommended that the contest be dismissed. It does not appear that any appeal was taken from that

finding, but your office, on receipt of the record, found that the mineral claimant had not complied with the law in the matter of expenditures, saying, further, that "according to claimant's own showing, the ground involved has not been sufficiently tested to either prove or disprove its containing a valuable mineral deposit," but upon this point, and in view of the action taken, your office declined to make any decision, presumably upon the ground that the failure of claimant to make the necessary expenditure was decisive of the whole question.

In the appeal from your office decision to this Department, claimant urged that under Rule 48 of Practice the findings of the local office upon a question of fact become final in the absence of an appeal, and that your office thereafter had no power to change those findings, except for causes specified in the rule itself.

While the Department in the decision, review of which is sought, did not discuss the point thus raised, it is presumed that the same was considered; and the disposition of the case necessarily involved the determination of the question raised adversely to appellant.

To entitle the claimant to patent, he must show that "five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors," Section 2325 of the Revised Statutes. Upon this point the register and receiver find as follows:

The testimony on the question of \$500.00 worth of labor and improvements is voluminous and in some things conflicting.

The improvements are meager, but the labor performed by Bryan and Womack, according to their testimony, goes to show the intention on their part to comply with the statutory requirements in good faith.

We are of the opinion that a fair preponderance of the evidence under the circumstances shows \$500.00 worth of labor and improvements to have been expended upon said Womack Placer prior to and during the period of publication, and recommend that mineral entry No. 256 be allowed to proceed to patent.

This alleged finding, from the words employed, can not be regarded as an affirmative finding of a fact. The employment of the words, namely, "a fair preponderance of the evidence under the circumstances shows," etc., indicates that the register and receiver came to a conclusion without positive testimony. Indeed, the local officers admit the meager character of the improvements, but think such improvement "goes to show the intention on their part to comply with the law," etc.

In all such cases, the findings of the local officers to justify the finality referred to in Rule 48 must be positive and unequivocal, not argumentative or presumptive, as appears in this case.

Under the circumstances, your office was justified in looking into the evidence which induced the so-called finding of the local officers. That evidence shows that the required expenditures had not been made.

The motion is denied.

MINING CLAIM—ADVERSE AGRICULTURAL CLAIM.

ASPEN CONSOLIDATED MINING COMPANY.

- A mineral claimant who, in his application to purchase, temporarily excludes part of his claim that is in conflict with an adverse agricultural claim, does not thereby absolutely waive and renounce all interest in the tract so excluded, but may thereafter assert his right thereto by way of protest against the final proof of the agricultural claimant.
- A mineral claimant who asserts an interest as against the final proof of an adverse agricultural claimant, and asks a hearing thereon, is entitled to be heard on appeal from the denial of his petition.

Secretary Smith to the Commissioner of the General Land Office, January 4, 1896. (E. E. W.)

I have before me the petition of the Aspen Consolidated Mining Company, filed June 15, 1895, for writ of certiorari in the above styled contest. In this petition it is alleged that the petitioner is the owner of the Fowler placer mining claim at Aspen, Colorado, and has been ever since 1889; that said claim was discovered on the 15th of May, 1883, and located on the 19th of the same month; that the said claim has never been abandoned, and that annual assessment work has been regularly done thereon; that the land embraced in the said claim is placer and not agricultural, and contains no mineral in vein or rock in place; that on the 10th of April, 1885, the contestee, John Atkinson, made pre-emption entry of the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, of Sec. 7, T. 10 S., R. 84 W., and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 12, T. 10 S., R. 85 W., and offered final proof September 27, 1886; that the said pre-emption entry conflicts with and embraces a portion of the said mining claim; that on the 4th of March, 1891, the said Aspen Consolidated Mining Company filed a duly corroborated affidavit, protesting against the said pre-emption entry, and alleging, in addition to the above, that the land embraced therein is not agricultural, but placer; that the entry was not made in good faith for agricultural purposes, but with fraudulent and speculative intent; and praying for a hearing and for opportunity to prove the allegations, and show that the entry should be cancelled. The petition also alleges that on the 23d of November, 1891, and while the said contest was pending before the Commissioner of the General Land Office, the petitioner applied for patent for the said Fowler claim; and also applied, on the 5th of March, 1892, to purchase the said claim, and as evidence of good faith, temporarily excluded from the last application, pending the contest aforesaid, the portion of the said claim in conflict with the said entry. It is also alleged in the petition that on the 19th of April, 1895, the Commissioner of the General Land Office dismissed the petitioner's protest aforesaid, and denied its right to appeal; that on the 9th of May, 1895, the petitioner filed a motion for review of the said decision of the 19th of April; and that on the 10th of June, 1895, the Commissioner overruled said motion for review.

Wherefore, the petitioner prays an order to the Commissioner of the General Land Office to certify the proceedings in the case to the Department, as provided in rules 83, 84, and 85 of the Rules of Practice, and that the decision of the Commissioner be reversed.

A copy of the application to purchase is attached to the petition, and shows that the exception was as follows:

but especially excepting and excluding from this application all that portion of ground embraced inpreemption D. S. No. 84 of John Atkinson. Said exclusion, nevertheless, being only temporarily made, pending the determination of the tract of the said agricultural claim in conflict with said Fowler placer, now at issue under hearing already ordered by the Hon. Commissioner of the General Land Office, and applied for by claimant herein, to determine the possessory right and title to said tract.

A copy of the Commissioner's said decision of the 19th of April, 1895, is also attached to the petition, and it shows that the material part of the said decision was as follows:

By the exclusion from said (application to purchase) of conflict with the D. S. of Atkinson, said Aspen Consolidated Mining Company waived its right to said conflict absolutely, and the qualifying clause following the exclusion, above quoted, can be of no effect, for it is not for the land department to examine or take cognizance of the intention with which action is taken by claimants.

I consider it to be a proposition most clearly enunciated by the Department in the case of the Adams Lode, 16 L. D., 233, that an exclusion from a mineral entry, of a portion of the ground applied for, is not only a waiver of any rights to the parcel so excluded under the application and entry, but it is an absolute renunciation of all right, title and interest in and to such excluded tract, and that by such exclusion the land excluded becomes so far as the applicant is concerned "vacant" public land.

As a protest, the paper filed by said Aspen Consolidated Mining Company is not regarded as sufficient to rebut the record evidence or to call for action by this office.

Said protest is accordingly hereby dismissed. As above stated in effect, the Aspen Consolidated Mining Company is a protestant without interest, in view of which fact, it has no right of appeal herefrom. Further action upon this case will, however, be suspended under rule 85 of Practice.

A copy of the Commissioner's said decision of June 10, 1895, overruling petitioner's motion for review, is also attached to the petition.

The petition alleges facts sufficient to constitute ground for the order prayed for, and the usual course in such cases is to make the order. But in this case it is obvious on the face of the petition and exhibits that upon examination of the record here the decision of the Commissioner dismissing the protest and denying appeal would have to be reversed, and a hearing ordered as prayed for in the protest. Therefore long and unnecessary delay would be avoided, and the ends of good administration best subserved, by overruling the said decision and ordering the hearing now.

It was error to hold that by so omitting the land in conflict from its application to purchase the petitioner waived and renounced absolutely all right thereto, that it was a protestant without interest, that the protest was not sufficient to call for action by the Commissioner, and

on these grounds to dismiss the protest and deny an appeal. In *Branagan v. Dulaney*, 2 L. D., 744, it was held that—

If the adverse is for a portion only of the claim of the applicant, he may elect to take patent for the portion of his claim that is not in controversy, and he may withdraw from his application so much of his original claim as is in controversy. By such withdrawal he leaves the part of his claim claimed by others in the condition it was before his application. He may then abandon his claim thereto, or he may litigate as to his rights with the party claiming adversely.

The decision in the *Adams Lode* case, 16 L. D., 233, is consistent with this rule. In that case it was held that the land in contest had been vacant more than two years when it was entered by the adverse claimant. In this case the land in conflict was not vacant. It constituted a part of the *Fowler* claim, which, the petitioner alleges, had been located and recorded, and maintained and perpetuated by annual assessment work, as the law provides, and although it was omitted from the application to purchase, it was included in the application for patent.

The petitioner is the owner of the *Fowler* claim, is not a protestant without interest, and it has the right of appeal. A protestant against pre-emption final proof who desires to clear the record in order that he may enter the land, has such an interest as entitles him to be heard on appeal. *McKinley v. Walsh*, 13 L. D., 507.

In the cases of *Weinstein v. Granite Mountain Mining Company*, 14 L. D., 68, and the *Nevada Lode*, 16 L. D., 532, it was held that a protestant against a mineral entry who alleges an adverse interest, and non-compliance with law on the part of the entryman, and whose application for a hearing on such charge has been denied, is entitled to be heard on appeal. This being so, it is obvious that, in the absence of any reason therefor, it would be a discrimination against the owner of a mineral claim who protests against an agricultural entry to deny to him the same right.

One who charges default against an entryman, furnishes proof in support thereof, and pays the costs of taking his testimony, is not a protestant, but a contestant, even though he formally waives all claim to a preference right of entry in the event of success, and as such contestant is entitled to the right of appeal. *Emblen v. Weed*, 13 L. D., 722. An absolute denial of an application to contest an entry is a final decision from which an appeal will lie. *Cameron v. McDougal*, 15 L. D., 243. The Commissioner of the General Land Office should not deny the right of appeal until an attempt is made to exercise such right. *Sanders v. North. Pac. R. R. Co.*, 15 L. D., 187.

The decision of the Commissioner of the General Land Office dismissing the protest and denying the petitioner the right to appeal is overruled and set aside, and he will order a hearing as prayed for in the protest, to determine whether there is a conflict between said placer claim and pre-emption entry, and if so, the extent thereof, and whether the land in conflict is placer or agricultural, and if placer, when it was first discovered to be such.

COAL LAND CLAIM—UNSURVEYED LAND—IMPROVEMENTS.

CURTIS *v.* SONGER.

Where a coal land claimant prior to survey locates a claim for himself, and an adjacent claim for another party, as agent, and it subsequently transpires after survey, that the improvements made on behalf of the latter claim are within the lines of the former, such improvements inure to the benefit of said claim, so far as third parties are concerned, and the claimant is not required to open and improve a mine on the land he claimed before survey.

Secretary Smith to the Commissioner of the General Land Office, January 4, 1896. (J. A.)

The land involved herein is the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 7, T. 5 S., R. 92 W., Glenwood Springs, Colorado, land district.

The plat of survey of said township was filed in the local land office May 8, 1889. On the same day John Songer filed coal declaratory statement No. 213 for the land in controversy, alleging possession since July 9, 1886. July 7, 1890, he applied to purchase the land, but his application was rejected because of conflicting claims. April 8, 1893, he again applied to purchase. April 13, 1893, the claimants of the conflicting claims were given thirty days' time within which to show cause why Songer should not be allowed to make entry. No action was taken by them, but on May 12, 1893, Nathaniel Curtis filed coal declaratory statement No. 432 for the land, and at the same time filed an affidavit of contest against Songer's claim, alleging:

That he is advised that one John Songer also makes claim to said land under a coal declaratory statement filed about 1889 under a settlement alleged to have been made about July 9th, 1886. This affiant states that he is advised and believes and therefore avers that said Songer did not at that time or any other make any settlement on or take possession of or do any work on said land for himself, but that such settlement and possession if taken at all by said Songer was so taken by him for and on behalf of The Colorado Coal and Iron Company and in its interest, and that at that time said Songer was in the employ of and under pay by said company to take such possession for it and to hold said land on its behalf and that said company paid for all the work so done on said claim, and said Songer is claiming said land in violation of the coal land laws of the United States, and his claim thereto is invalid and illegal.

This affiant therefore contests said Songer's claim and asks that a hearing be had to determine their respective rights to said land and that Songer's claim be canceled and this affiant's claim thereto be adjudged as superior.

Testimony was taken before the local officers, who rendered disagreeing opinions, the register recommending the rejection of Songer's application, and the receiver recommending the dismissal of the contest. On appeal, your office affirmed the decision of the receiver, and dismissed the contest. The contestant's appeal from said decision brings the case before me for consideration.

In 1886, when the land was unsurveyed, the Colorado Coal and Iron Company, intending to acquire coal lands, had a private survey made

of a part of said township to ascertain where the lines of the government survey would run. At that time Songer took possession, for his own benefit, of a tract of coal land, the boundaries of which, it was then supposed, would, upon the government survey, correspond exactly to the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 7. At the same time he, as agent for the Colorado Coal and Iron Company, took possession of the land lying immediately south of the tract claimed by him. The Colorado Coal and Iron Company placed valuable improvements on the extreme northern part of the land held for them by Songer. The government survey of the land showed that these improvements were in fact made on the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 7, the southern boundary of which tract was by said survey shown to be from two hundred to four hundred feet further south than it was supposed to be. When the plat of survey was filed in the local office, May 8, 1889, Songer filed declaratory statement for said N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 7. A few days thereafter, May 13, 1889, the Colorado Coal and Iron Company discharged him from their employ, stating in the letter written to him that day that because of his course in making said filing he can no longer be retained in their service. May 21, 1889, Songer was driven from the land by men in the employ of the Colorado Coal and Iron Company, who threatened to kill him. He re-established his residence on the land June 17, 1893.

The decision appealed from states that the affidavit of contest charges that Songer's filing was made for the benefit of the Colorado Coal and Iron Company; and that the sole issue presented for decision is whether Songer made the filing in his behalf and for his benefit. The contest was, by said decision, dismissed on the holding that the facts in the case, as above stated, are inconsistent with the charge that the entry was made in the interest and for the benefit of the Colorado Coal and Iron Company.

The affidavit of contest, taken by itself, warrants the inference that it was intended to charge that Songer is attempting to acquire title to the land for the benefit of the said company. However, there is nothing in the record to support such an inference. The appellant contends that the affidavit does not charge, and that it was not intended to charge, that Songer is attempting to acquire title to the land for the benefit of the Colorado Coal and Iron Company, but that the only charge made is that Songer did not do any work on the land for himself, and that his claim to the land is therefore illegal. This is doubtless a correct explanation of the allegations of the contest affidavit.

The appellant strenuously contends that the defendant has not opened and improved a mine on that part of the land which he claimed before the government survey; that he has done no work on the strip of land found after the survey to be on the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 7, except as the agent for the Colorado Coal and Iron Company; that he can not be allowed to include said strip of land in his entry; and that his agree-

ment with said company to hold land for it was fraudulent, as the company was not qualified to acquire title.

The improvements made by the Colorado Coal and Iron Company inured to Songer's benefit. It was therefore not necessary for him to open and improve a mine on the land he claimed before the survey. The fact that Songer was not in the possession of all the land embraced within the legal subdivisions which he applies to enter can not be urged as a ground of contest by Curtis, who is not an adverse claimant. Moreover, Songer would have the right of entry even as against an adverse claimant for the reason that the greater part of each legal subdivision was in his possession. His claim can not be defeated by the charge of fraud as to his agency in holding for the Colorado Coal and Iron Company land, a small portion of which is embraced in the land now applied for by him. Nor does the charge of fraud against him in intending, as is claimed, to "hold up" said company for a large sum of money, affect his rights.

In August, 1889, two coal declaratory statements were filed, each including eighty acres of the tract in question. Both applicants alleged that they had made improvements to the value of five thousand dollars. On the report of a special agent, stating that the improvements were made by the Colorado Coal and Iron Company, and not by the applicants, your office, on December 16, 1889, held these filings for cancellation. March 27, 1893, after hearing was had, the filings were canceled. The contestant states that he has not been permitted to examine the special agent's reports in these cases, but is confident that they were based upon affidavits made by John Songer, the defendant herein, or at least upon information given by him to the special agent. He therefore moves, for the purpose of sharply bringing to the attention of this Department all the facts concerning this land, that said special agent's reports in these cases, together with all the original papers accompanying the reports, be considered in connection with this case.

The equities are very plainly with the defendant. He was justified in giving information to the special agent, to protect his claim and to secure the cancellation of fraudulent filings. His *bona fide* possession of the land since 1886, was generally known to the residents in that vicinity. It can not be presumed that in giving information to the special agent he made statements not in harmony with these facts. The motion is therefore denied.

The decision appealed from is affirmed.

NORTHERN PACIFIC RAILROAD GRANT—ACTS OF 1864 AND 1870.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 13, 1896.

REGISTER AND RECEIVER,

Vancouver, Washington.

SIRS: On February 3, 1891, instructions were given your office for the restoration of the lands within your district, which had been part of the grant to the Northern Pacific Railroad Company, but had been declared forfeited by the act of September 29, 1890, and a diagram showing the area covered by the forfeiture was furnished you. On said diagram and in said instructions the terminal previously established at Portland, Oregon, for the constructed portion of the road under the joint resolution of May 31, 1870, was adhered to, and the order for the restoration did not include any lands within the primary limits established under said joint resolution.

On July 18, 1895, in the case of *Spaulding v. Northern Pacific Railroad Company* (21 L. D., 57), affirmed on review October 18, 1895, the Secretary of the Interior decided that there are two grants to the Northern Pacific Railroad Company, the first by the act of July 2, 1864, and the second by the joint resolution of May 31, 1870, in the neighborhood of Portland, Oregon, and that so far as the limits of the grant of 1864 overlapped the subsequent grant, the latter must fail; that the forfeiture by the act of September 29, 1890, of the former, included the lands within the overlap, and that they are subject to disposal thereunder.

It is the duty of this office therefore to dispose of the lands within said overlap, and I have accordingly prepared, and herewith enclose, a diagram showing within the colored lines marked "20 miles limit act of 1870", "40 miles limit act of 1870", "40 miles limit act of 1864" and "Western terminal of forfeiture act of September 29, 1890", the area affected by the Spaulding decision.

To the end that all persons interested may have opportunity to present any claims they may have to any of these lands, you will cause to be published, for a period of thirty days, in some newspaper of general circulation in their vicinity a notice that said lands were declared forfeited by the act of September 29, 1890, and restored to the public domain, and are subject to disposal by your office, and that in order to protect their rights all claimants under said forfeiture act of 1890, and under the act of March 3, 1887, should come forward and assert their claims.

The receiver, as disbursing officer, will pay the cost of publication, and forward a copy of the notice, with proof of publication, as his voucher for the disbursement.

Very respectfully,

Approved,

HOKE SMITH, *Secretary.*

S. W. LAMOREUX,

Commissioner.

TOWN LOTS—SPECIAL ACT OF MARCH 2, 1833.

JOHN A. GRAHAM.

Lands laid off as town lots, and offered at public sale in accordance with the provisions of the special act of March 2, 1833, establishing the town of St. Marks, Florida, are thereby removed from the operation of the general land laws, and are subject to private sale as provided in section 2, of said act.

Secretary Smith to the Commissioner of the General Land Office, January 20, 1896. (A. M.)

I have before me the letter of the 18th ultimo, from your office, stating that John A. Graham made application on October 5, 1892, to purchase certain lots in the town of St. Marks, Florida, under the provisions of section 2 of the act of Congress approved March 2, 1833—4 Stat. 664; that the register and receiver at Gainesville rejected the application for the reason that public lands in Florida were not subject to cash entry and that Graham appealed to your office from such act of rejection.

The opinion is expressed therein that the lots covered by the application that have not heretofore been disposed of cannot now be disposed of at private sale in view of the provision in the act of March 2, 1889—25 Stat. 854—restricting the private entry of public lands to the State of Missouri, and instructions are asked for, my attention being also called to section 9 of the act of March 3, 1891—26 Stat. 1095—providing that no public lands, except those mentioned in said section 9, shall be sold at public sale.

In answer, you are advised that the act of March 2, 1833, referred to, entitled "An Act to establish a town at St. Marks, Florida," authorized the President to cause such public lands as he deemed proper, at or near St. Marks, to be laid off in town lots, and section 2 thereof, under which Graham applies, provided for the public sale of such lots (with certain exemptions) and for the sale at private entry of the lots remaining unsold after the offering.

In accordance with the terms of the act the lands to which it applied were duly surveyed, lotted and offered by proclamation of the President.

By virtue of this action under the law the lands were no longer subject to the operation of the general land laws, under the common acceptance of that term. Hence the rule laid down in the case of *Newhall v. Sanger*—92 U. S. 761—that "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws," is applicable to the case presented and governs action therein.

Under this rule of construction, the act of March 2, 1833, remains effective, notwithstanding the subsequent general acts to which attention has been directed, and the lots applied for by Graham, except those stated to have been disposed of heretofore, are subject to private sale under section two hereof.

GRUVER *v.* DAVIDSON.

Motion for review of departmental decision of October 31, 1895, 21 L. D., 340, denied by Secretary Smith, January 13, 1896.

MINING CLAIM—ADVERSE PROCEEDINGS.

DE GARCIA ET AL. *v.* EATON ET AL.

A declaration in ejectment filed in a court of competent jurisdiction by an adverse claimant, within the statutory period, and in accordance with local statutes, is such a commencement of "proceedings" as to suspend the jurisdiction of the Department under section 2326, R. S., even though summons on said declaration does not issue within said period.

Secretary Smith to the Commissioner of the General Land Office, January 13, 1896. (P. J. C.)

It appears by the record before me that Joseph I. Eaton *et al.* made application for patent, July 26, 1892, for the Birth Day lode claim, survey No. 862 C, Las Cruces, New Mexico, land district, and during the period of publication Daniel De Garcia *et al.* filed a protest and adverse claim against the same. The period of publication expired September 27, 1892, and within thirty days thereafter, on October 15, the adverse claimants filed their declaration in a suit in ejectment against Eaton *et al.* Summons was not issued in this action until after the expiration of the thirty days limited by statute within which suit should be commenced.

A motion was filed in the local office May 1, 1893, asking that the protest be dismissed, because action had not been commenced within thirty days. This was supported by the certificate of the clerk of the court, dated March 2, 1893, showing that no process had been issued against the defendants, or any application made for the same. On May 16, following, the register overruled this motion, but on reconsideration the local officers, on June 9, 1893, reversed the former ruling of the register, and granted the motion.

Notice of this action was received by counsel for Garcia *et al.* June 10, and on July 8, they filed an appeal. It does not appear that notice of this appeal or the specifications of error were served on the opposite party, and on July 21, Eaton *et al.* filed a motion to dismiss said appeal on the ground that they had no notice thereof. Meantime, however, and on July 13, all the papers, including the appeal, were forwarded to your office.

Your office, by letter of March 6, 1894, considered the case under Rule 48 (Rules of Practice); held that it was not "deemed necessary to consider the appeal, or motion to dismiss the same;" and reversed the action of the local officers in dismissing the adverse. The mineral claimants therefore prosecute this appeal, assigning numerous grounds of error, which may be condensed into two propositions: first, error in

deciding that the filing of a declaration is the commencement of a suit in contemplation of the statute; and, second, substantially, that it was error to consider the appeal by the adverse claimants because of the lack of service of the same on the mineral claimants.

There is no force in the second assignment of error as given above, for the reason that your office did not consider the case as on appeal, but did determine it under Rule 48.

Section 2325 of the Revised Statutes provides that, if no adverse claim is filed against a mineral application during the sixty days period of publication, the applicant shall be entitled to a patent. Section 2326 declares:

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

In the case at bar the adverse claim was filed within the time limited by statute, and within thirty days thereafter a declaration in ejectment was filed in a court of competent jurisdiction, but it is conceded that summons was not issued on the declaration by the clerk of the court "within thirty days after filing his (adverse) claim." It is therefore contended by appellants that the adverse claimants did not commence proceedings within thirty days from the filing of the adverse claim, as contemplated by the statute, or, in other words, that service on the defendants should have been made within the thirty days period fixed for the commencement of proceedings under the adverse.

This position is, in my judgment, untenable. The statute provides that the adverse claimant shall "commence proceedings in a court of competent jurisdiction" within thirty days. These proceedings must be brought under the laws of the State or Territory in which the land is situated. Section 1907, Compiled Laws of New Mexico (1884), says: "All suits at law in the district courts shall be commenced by filing a declaration in the office of the clerk of the court." Without attempting to say how the courts of that Territory would construe this statute, it is sufficient, for the purposes of this case, to decide that the filing of the declaration was such a commencement of proceedings as to suspend the jurisdiction of the Department and stay all proceedings therein "until the controversy shall have been decided by a court of competent jurisdiction." If the case has not been prosecuted with diligence, the defendants should look to the court that now has jurisdiction of the matter.

Your judgment is therefore affirmed.

MONROE ET AL. v. TAYLOR.

Motion for review of departmental decision of October 1, 1895, 21 L. D., 284, denied by Secretary Smith, January 13, 1896.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

JONATHAN E. WOOD.

A soldiers' homestead declaratory statement relinquished on account of the alleged worthless character of the land covered thereby, will be held to have exhausted the homestead right, where it does not appear that due diligence was used to ascertain the character of the land covered by his filing.

Secretary Smith to the Commissioner of the General Land Office, January 13, 1896. (C. J. W.)

On October 13, 1893, Jonathan E. Wood made homestead application for the NE. $\frac{1}{4}$, Sec. 19, T. 21 N., R. 2 W., to register and receiver at Perry, Oklahoma.

On the same day said application was rejected for the reason that Wood had exhausted his homestead rights and on November 11, 1893, he appealed from said rejection to your office.

On July 26, 1894, your office considered said appeal and approved the action of the local officers in rejecting said application.

November 26, 1894, Wood filed his appeal from your office decision.

It appears from the record that on November 9, 1893, Wood filed soldiers' declaratory statement No. 304 for SW. $\frac{1}{4}$, Sec. 29, T. 11 N., R. 16 W., by an agent. Wood alleges that the land was worthless and that upon ascertaining that fact he at once went to Oklahoma and relinquished it.

It does not appear that the entry was made through mistake, or that proper diligence was used to ascertain the character of the land before filing the declaratory statement.

The filing of such statement under these circumstances exhausted his homestead rights. *Roberts v. Howard* (4 L. D., 561); *Stephens v. Ray* (5 L. D., 133).

Your office decision is accordingly approved.

PATTERSON ET AL. v. LINDSTROM.

Motion for review of departmental decision of December 13, 1894, denied by Secretary Smith, January 13, 1896.

PRACTICE—MOTION TO DISMISS—RULE OF JANUARY 17, 1891.

MATHIESON *v.* TEMPLIN (ON REVIEW).

If a party making a motion to dismiss an appeal desires to have it acted upon independently of the record he must move for such action under the rule of January 17, 1891, otherwise the Department will act on the presumption that such party filed to submit his case on the record as it stands.

Secretary Smith to the Commissioner of the General Land Office, January 13, 1896. (P. J. C.)

I have before me a motion for review of departmental decision of September 28, 1895 (21 L. D., 234), filed by counsel for Robert W. Mathieson, Mayor of Fort Pierre, wherein was dismissed his contest against the homestead entry of Charles F. S. Templin for lots 2 and 3, Sec. 34, Tp. 5 N., R. 31 E., B. H. M., Pierre, South Dakota, land district.

It will be observed that Templin made a homestead entry of said tract August 13, 1891; that on July 16, 1892, Mathieson, as mayor, filed an affidavit of contest against the entry, alleging that it was embraced in the corporate limits of Fort Pierre and had municipal improvements on it. On the same day he presented his declaratory statement for entry for townsite purposes.

A hearing was had, and as a result the local officers filed dissenting opinions. On consideration of the record, your office, on December 21, 1893, found:

That in addition to the application for the land here in question, and previously thereto, to wit, in January, 1892, the city of Fort Pierre had by its mayor applied to enter, as an addition, lots 3, 4, and 8, in Sec. 28, and lot 1, in Sec. 27, in said township and range, containing 53.40 acres, and that your office had directed the local office, by letter "G" of March 8, 1892, to reject said application, because the land in question was a part of the land in controversy between Black Tomahawk and Jane E. Waldron (13 L. D., 683 and 17 L. D., 457).

By the decisions cited the claim of Waldron was disposed of adversely to her, and it appears from your office decision of 1893, under consideration, that the interest or claim of Black Tomahawk was disposed of by your office letter of November 11, 1891, to the register and receiver. Said decision of 1893 further found that at the date of the hearing (August 29, 1893), no one was living on the land in question but Templin and his family; that the town was not entitled under the provisions of section 1 of the act of March 3, 1877 (19 Stat., 392), to enter all the land within its corporate limits, and held that since the claims of Waldron and Black Tomahawk had been disposed of, the city of Fort Pierre should be allowed to elect, as provided in section 3 of the act of 1877, *supra*, what portion of the land embraced in said corporate limits, in compact form, shall be withheld from entry.

The local officers were required to notify the town authorities that they would be allowed sixty days within which to file proper evidence of its election as to which of the tracts it would take.

From this judgment Templin appealed, and the Department, on September 28, 1895, reversed your office decision, dismissed the contest, and held Templin's entry intact.

The motion for review contains twenty-three specifications of error, attacking, *seriatim*, almost every finding of fact and conclusion of law stated or discussed in the original decision. There is nothing, however, suggested by this extraordinary array of alleged errors that was not thoroughly examined and considered in the first instance.

It is claimed by counsel that the Department should have given the contestant an opportunity to file a brief on the merits of the case after his motion to dismiss the appeal of defendant had been overruled. That is not the practice before the Department. If the person making a motion to dismiss an appeal desires to have it acted on independently of the record, he must move to have it done under the rule of January 17, 1891 (12 L. D., 64). If this is not done, the presumption is that the movant is satisfied to submit his case on the record as it stands, and the Department will act on it, giving it the same attention as though briefs were filed.

One other point suggested by counsel may be properly adverted to. It is claimed that the exhibit "Z," made by stipulation, fixes the south boundary of the alleged townsite as it existed in 1890, when the petition for incorporation was first presented to the county commissioners. This exhibit shows the south boundaries as they are claimed to exist May 3, 1890, and March 16, 1891, but they are so widely divergent as to be of no practical value for the purpose for which the exhibit was made. But I take it this is wholly immaterial. The gist of the case is, that the town of Fort Pierre did not extend its municipal authority over the land, or use it for municipal purposes, and did not include it in its application, which resulted in the issuance of patent for the "mile square," September 12, 1892, as it might probably have done. In the meantime, and before it sought to get it, a homestead right had accrued to Templin. So whether the south boundary of the other applications was definitely fixed or not cuts no figure in the case, and the discussion of that point was merely incidental.

Aside from all other considerations, however, it is not entirely clear but that the town authorities had forfeited all right to the land in question under your office judgment. By that they were required to elect whether they would take that applied for north of the mile square, in sections 27 and 28, or that south of it—the land in dispute. They took no appeal from this judgment, and did elect to take and procured patent for that north. So that it would seem as if they were precluded from asserting any right to the tract in controversy.

The motion is overruled.

TIMBER CULTURE CONTEST—ALIENATION.

MIDLESTAEDT *v.* HAGGARD.

A timber culture entry will be canceled where it appears that the entryman has disposed of all his interest in the land, and is holding the entry for the benefit of the party purchasing such interest.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (W. F. M.)

On November 7, 1890, Ernest M. Haggard made timber culture entry of the SE. $\frac{1}{4}$ of section 30, township 108 N., range 35 W., in the land district of Marshall, Minnesota, and on November 10, 1893, Fred Middlestaedt filed a contest affidavit alleging,

that said E. M. Haggard has wholly failed to plant any trees or cuttings on said land since his entry and up to and including the date hereof; that in the month of November, 1890, he planted tree seeds on said land, but they failed to germinate, and the ground whereon they were planted was afterwards plowed up and sown to flax, and no replanting the tree seeds was done after said date on any part of said land; that the said Ernest M. Haggard has sold the above tract to one Herman Brown; that on the 8th and 9th days of November, 1893, the said Herman Brown planted five acres of trees on said land, but said planting was done solely for the benefit of said Brown and pursuant to the provisions of the bargain and sale of the said land by the said entryman to the said Herman Brown, and was and is in no way a compliance in good faith with the timber culture laws as pertaining to the said entry of the said Haggard.

The register and receiver, after a hearing, recommended that the contest be dismissed, but on appeal to your office their decision was reversed and the entry held for cancellation. The contestee has appealed the case here.

The testimony shows that the entryman, Haggard, entered into a contract with Herman Brown, by the terms of which Brown was to take possession of the claim and do all the work that was necessary to be done in order to support the final proof to be made by Haggard at the proper time, and after final certificate Haggard was to make title to the land to Brown, the consideration therefor being \$750, evidenced by a note for that amount executed and delivered into the hands of Haggard. Interest on this sum was to be paid annually, at the rate of seven per centum, and the evidence shows that one year's interest had already been paid at the date of the hearing. As a part of the same transaction Brown paid to Haggard \$100 in cash for the improvements on the land.

It is not deemed necessary to decide that this transaction was technically a sale.

It is clear from its terms, however, that Haggard disposed of all his interest in the land, whatever that may be, and is simply holding it for the benefit of Brown.

It has been held by this Department that, if an entryman for a valuable consideration received, sold the claim and his improvements thereon, no matter how the papers are made out, his interest in the claim is at an end; there-

after he holds it not for his own use and benefit and the entry, upon the facts being shown, will be canceled. *Williamson v. Weimer*, 9 L. D., 565.

This is precisely the thing that the entryman in this case has done.
The decision of your office is therefore affirmed.

PRACTICE—RIGHT OF AMENDMENT—PREFERENCE RIGHT.

MUNDELL ET AL. v. LANE.

The recognition of the right of amendment in a contestant, as against the right of a third party to proceed against the entry under attack, is a matter that the contestee is not entitled to call in question, where he has due opportunity to prepare for trial.

The question of preference right under a contest must be determined when the alleged privilege is duly asserted.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (J. McP.)

The land involved herein is embraced in timber culture entry No. 3125, made by Charles L. Lane, August 14, 1895, and includes the NE. $\frac{1}{4}$ of Sec. 20, T. 5 N., R. 31 W., McCook land district, Nebraska.

February 6, 1892, Robert L. Mundell filed an affidavit of contest, alleging that—

Charles Lane has failed to break or cause to be broken five acres between August 14, 1886, and August 14, 1887, and the said Charles L. Lane has failed to cultivate or cause to be cultivated, or failed to plant trees, seeds, or cuttings, or caused the same to be done, at any time since making entry on the aforesaid tract.

Mundell's contest was held subject to that of John H. Bishop against the same entry that was then pending before the land department.

September 23, 1892, Samuel Leydel filed an affidavit of contest against Lane's entry, alleging,

That on August 14, 1890, said tract did not contain more than 200 living trees, that since August 14, 1890, no part of said tract had been planted to trees, seeds or cuttings; that no part of said tract has been cultivated since August 14, 1890.

Leydel's contest was held subject to the prior contests of Bishop and Mundell.

November 12, 1892, this Department affirmed your decision "H" of October 12, 1891, dismissing Bishop's contest. The local officers having been advised of said departmental decision, by your office issued, on December 8, 1892, notice of hearing on Mundell's contest, setting the hearing for February 28, 1893. The cause was continued to April 12, 1893, at which time all the parties hereto appeared. The defendant, Lane, filed a motion to dismiss Mundell's contest, on the ground that all the questions raised by said contest had been fully adjudicated in the departmental decision of October 12, 1892, disposing of the Bishop contest.

The local officers sustained defendant's motion to dismiss, and stated that Mundell would be allowed to amend his contest affidavit; thereupon Mundell amended his affidavit so as to charge that the said Charles Lane

Has failed during the timber culture years ending August 14, 1891, and August 14, 1892, and to date (to) replant to trees or cuttings any portion of the said tract or cultivate the same, there not being a stand of trees thereon before said first mentioned year.

Leydel, the second contestant, then asked that he be allowed to proceed with his charges, and that Mundell's amended affidavit of contest be held subject to the contest filed by him (Leydel). The local officers denied Leydel's motion, to which action he saved his exceptions. Mundell and Lane then entered into an agreement continuing the case until May 16, 1893. May 29, 1893, the local officers decided that Mundell had established the charges contained in his amended affidavit, and recommended that Lane's entry be canceled.

From the decision of the local office both Lane and Leydel appealed to your office. By letter "H" of December 30, 1893, you remanded the case to allow Lane to introduce testimony, if he so desired, it not appearing that the local office had rendered a decision on the demurrer filed by Lane. In your said decision you held that the testimony introduced by Mundell made out a *prima facie* case.

The local officers set the second hearing for February 20, 1894, at which time Leydel appeared and asked that he be substituted as contestant in place of Mundell. He offered to refund the money paid by Mundell and made a tender of the amount shown by the records to have been paid by Mundell. His motion was denied. The case was then continued to April 4, 1894, at which time Lane moved that Mundell's contest be dismissed, for the reason that the hearing should have been in the first place ordered on Leydel's contest. This motion was also overruled, and Mundell offered further testimony showing that the defendant had made no attempt to comply with the timber culture law since May 16, 1893, the time of the former hearing. Lane again refused to submit testimony.

April 9, 1894, the local officers rendered their decision, recommending that Lane's entry be canceled. Lane appealed to your office, and by letter "H" of July 20, 1894, you affirmed the decision of the local office and held Lane's entry for cancellation.

As to the controversy between Leydel and Mundell, you say—"The question of preference right of entry between Mundell and Leydel is not in issue."

From your said decision both Lane and Leydel have appealed to this Department.

The former claims that the procedure allowing Mundell to establish the charges contained in the amended affidavit was irregular and void, and that the testimony does not support a judgment of cancellation.

The latter stated that Mundell should not have been allowed to proceed on his amended charges in the face of the fact that such charges had been incorporated in his, Leydel's contest filed prior to such amendment, and he asks that the Department designate the party entitled to a preference right.

In so far as the rights of Lane are concerned, I do not see that it is material whether or not the local officers erred in permitting Mundell to amend his affidavit of contest, in the presence of Leydel's prior contest. One whose entry is attacked, for a failure to comply with the law, has no right to choose his adversary, or say who is entitled to proceed against him. As to who is entitled to prosecute the suit, is a matter between the parties claiming such a privilege. The entryman was allowed an opportunity to prepare for the trial, as the case was continued by agreement, of which he was a party, for more than thirty days after Mundell's amended affidavit was filed before the testimony was taken in the case. Moreover, it does not appear that Lane objected to the allowance of Mundell's amendment at the time it was filed, nor on his first appeal to your office, but relied on the insufficiency of the evidence adduced by Mundell.

The testimony introduced by Mundell clearly shows that Lane had not complied with the timber culture law, and amply supports a judgment of cancellation.

Your judgment holding said entry for cancellation is affirmed.

As the question of preference right is one which must be determined on an attempt to exercise the privilege, it would be improper for this Department at this time to express any opinion as to the party entitled thereto in this case.

PRACTICE—NOTICE OF DECISION—ACCEPTANCE OF SERVICE.

YEOMAN *v.* DE ROCHE.

An acceptance of service of notice of a decision and of the "further right of appeal," signed by an attorney of record, is conclusive as to the service of such notice, and a waiver of the right of such attorney, or his client to receive a copy of the decision in question.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (J. L.)

This case involves the NE. $\frac{1}{4}$ of section 9, T. 24 N., R. 2 W., Indian meridian, Perry land district, Oklahoma.

On September 3, 1895, this Department on motion of J. W. Yeoman dismissed George F. De Roche's appeal from your office decision of March 30, 1895, because said appeal was filed sixty-one days after service of notice of said decision. On October 8, 1895, De Roche filed an "application for writ of certiorari," alleging that "on the 3d day of June, 1895, service of notice of said decision was accepted by L. P. Hudson, attorney of record for the defendant, but no copy of the Com-

missioner's decision was served either on the defendant or his attorney." The affidavits of De Roche and Mr. Hudson are filed in support of this statement; but neither of them pretends that a copy of the decision was asked for.

Your office entertained De Roche's appeal, and transmitted with it the original record of all the proceedings in the case. That record, which is now before me, shows that on April 3, 1895, Mr. J. L. Calvert, attorney for Yeoman, and Mr. L. P. Hudson, attorney for De Roche, met in the local land office at Perry, and your office decision was shown them. They doubtless read it together; for then and there they both signed an acceptance of service of notice in the following words:

UNITED STATES LAND OFFICE,
Perry, O. T., April 3, 1895.

We hereby accept service of Commissioner's letter "H" "W. M. C." of March 30, 1895, and of our further right of appeal within the usual time *from this date* as prescribed by law.

J. L. CALVERT,
Attorney for Yeoman.
L. P. HUDSON,
Attorney for De Roche.

No other words could have more explicitly waived Mr. Hudson's right to receive a copy of said letter.

Moreover on June 3, 1895, sixty-one days after the date from which the usual time for the exercise of the right of appeal was to be calculated, Mr. Calvert attended at the local land office. He had not been served with either an appeal or a specification of errors. He then and there met Mr. Hudson, who then filed his appeal. Mr. Calvert filed a motion in writing to dismiss or reject said appeal, because "more than sixty days have expired since date of service as shown by the record." And Mr. Hudson then and there at the foot of said motion, accepted service thereof. Even then Mr. Hudson did not complain that he had not been properly served with a copy of your office decision. The appeal with its eleven specifications of error, carefully prepared, shows that the writer had access to the original letter.

The Rules of Practice (17 and 66) do not prescribe the form of notice of a decision subject to appeal. But this Department has made several rulings on the subject. See 5 L. D., 233, 8 L. D., 192, 12 L. D., 74, 16 L. D., 187, 18 L. D., 192, 19 L. D., 461, and 20 L. D., 89.

I see no reason why Messrs. Calvert and Hudson for themselves and for their clients, should not have accepted service of your office letter,—as they did.

The application for certiorari was evidently filed in ignorance of the fact that the whole record of the proceedings had already been transmitted to this Department. I have therefore considered the application and the affidavits filed therewith as a motion for review, conceding the facts stated to be true. For the reasons above stated De Roche's motion is hereby denied.

PRACTICE—DISMISSAL OF CONTEST—WITHDRAWAL OF DISMISSAL.

VANDIKE *v.* BENJAMIN.

A contestant who, on the day of hearing, files a dismissal of the contest, together with a new affidavit of contest, with a view to proceedings thereon, may properly be permitted, prior to further action in the premises, to withdraw the said dismissal, and submit evidence under the original charge, where good faith on the part of said party is manifest.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (C. J. G.)

On September 16, 1891, Alvin M. Benjamin made homestead entry for the SE. $\frac{1}{4}$ of Sec. 29, T. 1 N., R. 31 W., McCook land district, Nebraska.

On October 2, 1893, John W. Vandike filed affidavit of contest against said entry, alleging abandonment.

Notice issued, and hearing was had December 4, 1893, both parties being present with their counsel and witnesses.

Upon the testimony submitted the local officers decided in favor of the contestant, and recommended cancellation of the entry. An appeal was duly taken to your office, and by letter of July 20, 1894, you affirmed the action of the local office.

A further appeal brings the case to this Department, and the following errors are assigned:

1. At the time of the trial of the purported contest case before the register and receiver, there was no contest pending, the contestant having dismissed his contest on the day of hearing, and the register and receiver had no jurisdiction to hear said contest after the same was dismissed.

2. The court erred in finding that the contestee, Alvin M. Benjamin, had failed to comply with the law as to settlement and cultivation, and that he had failed to establish his residence upon the land.

From an examination of the record it is evident that Benjamin never established residence on this land in compliance with the law; consequently, though hardship may be inflicted thereby, his entry will have to be cancelled.

The remaining question, therefore, necessary to be determined by this Department, is whether or not certain proceedings had at the local office prior to taking testimony were irregular or erroneous. In order to fully set forth the facts in the case it will be necessary to embody herein the statement of the opening proceedings as prepared by the local office. The record is as follows:

At the time set for the hearing, the parties appeared in person and by their attorneys,—Rittenhouse and Boyle, for the contestant, and A. D. Gibbs for the contestee, and the hearing was begun.

William Chestnut and J. W. Harker were sworn as witnesses in behalf of the contestant. Thereupon the attorney for the contestant asked for a few minutes time, and at 11.30 A. M. filed new affidavit of contest and dismissed this case. Also asked for notice upon the new contest.

The contestee objects to the filing of a new affidavit of contest and asks that the contestant be required to proceed upon the original affidavit, or that the second complaint be dismissed.

Adjourned to 1 P. M.

1 P. M., attorneys for both parties appeared.

Here the contestee made the following motion:

The contestee moves the court for judgment upon the original complaint filed in this action

Whereupon the contestant withdraws his dismissal and submits his witnesses for examination, and waives notice on the contest just filed until the termination of this case.

The contestee objects to the withdrawal of said dismissal and asks that the court rule upon his motion for judgment. By the register: The contestant having withdrawn his dismissal and offered to proceed upon his original complaint, the motion for judgment upon the complaint is overruled, and the contestant will proceed with his testimony.

To which the contestant excepts.

William Chestnut being called as a witness for the contestant, and having been duly sworn in the case testifies as follows:

State your name, age and occupation.

William Chestnut, 40 years old, farmer.

2. Have you known the SE. $\frac{1}{4}$ of 29, 1, 31, being the homestead entry of Alvin M. Benjamin, since Sept. 16, 1891?

The contestee objects to the introduction of any evidence under the complaint filed in this action for the reason that the contestant had abandoned and dismissed the same.

Overruled. Excepted to by contestee.

In addition to this record the register prepared the following statement, in response to motion of attorney for contestee, suggesting a diminution of the record:

The register inserted in the record all he thought indicated the formal procedure taken. As to the conversation and statements made, for the information of the Commissioner, if required, he states the following as his recollection:—he having taken the testimony. He has no definite recollection of the conversation before adjournment. The record shows that all was formally done then. It was just noon, and the register being somewhat undecided as to proper procedure, simply said we will adjourn until 1 P. M. At 1 P. M. attorneys for both parties were present, and the attorney for contestee at once entered the motion following the words noting the adjournment. The register examined some authorities and read one in presence of the attorneys. Both attorneys and register engaged in considerable conversation as to whether any judgment could be entered, or whether the case stood dismissed on the dismissal entered by the contestant. The attorneys for contestee claimed they were entitled to judgment; the attorney for contestant claimed the office has no jurisdiction to render judgment—there having been no testimony submitted, and that the only judgment that could be rendered, if any, was one of dismissal. The register remarked that the contestant was either in court or out. If in, judgment could properly be rendered; but if out, how could he be bound by a judgment? Just then, the register walked into the main office to consult with the receiver, remarking that if any action was taken, it ought to be the joint action of the register and receiver. Just as the register had begun to converse with the receiver, the attorney for the contestant called the attention of the officers, and said he would withdraw the dismissal and go ahead with the original case. This was accepted by the office—the former question was not further considered, and the case proceeded as shown by the record—over the objection there stated.

In support of their contention that it was error to allow the contestant to withdraw his dismissal of contest, counsel for claimant rely upon the case of *Delaney v. Bowers*, (1 L. D., 163), wherein it is said—

Where a contest has been regularly initiated and the contestant withdraws at or before the day fixed for trial, he will be regarded as in default, and the case will proceed and be decided accordingly. The same party will not be permitted to renew the contest on the same ground.

The contest affidavit filed by plaintiff on the day of trial, December 4, contained the charge of abandonment, and was couched in language similar to that of October 2. Blank notices were prepared in line with the affidavit, but were not dated nor signed.

The case above referred to is not applicable to the one under consideration. The decision in that case grew out of great abuses that were being practiced in the local offices. Parties for speculative purposes would “initiate contests, withdraw before the day of trial, then renew the contests, and so harass contestees and involve them in continued expenses.” The decision in that case does not, and evidently was not intended to apply to the contestants who were apparently acting in good faith. This view is fully sustained in a subsequent decision, wherein it was said,

I do not, however, concur in that part of this decision which says, “when a contest has been regularly instituted, and the contestant withdraws at or before the day fixed for trial, he will be regarded as in default, and the case will proceed, and be decided accordingly,” as applied to a case like that of *O’Kane*, where there appears to be an entire absence of bad faith. (*O’Kane v. Woody*, 2 L. D., 64).

A motion for withdrawal of contest, whether verbal or written, at or before the day of trial is only an interlocutory proceeding, and will be decided on the day of trial. (See instructions 2 L. D., 218).

Hence, until the case had “proceeded and been decided,” and judgment on the original complaint had been rendered, it remained within the jurisdiction of the court. Before this had been done, and while the local officers were debating what course to pursue, the contestant withdrew his dismissal, and thus relieved them from rendering a decision on Benjamin’s motion. There is no question that if the case had “proceeded and been decided” Vandike would have been in default, for he would not have been “permitted to renew the contest on the same ground.” By withdrawing the dismissal of his contest the case was left in its original status, to be tried on its merits. Counsel for defendant introduced his own witnesses and cross-examined those of the plaintiff.

The fact that the contestant filed a request for the dismissal of contest will not defeat his preference right of entry thereunder, where he subsequently, in good faith, prosecutes the same to a successful termination. *Moore v. Lyon*, (12 L. D., 265).

It is not claimed that Vandike’s contest is speculative, or that it was brought for any other purpose than to secure the cancellation of the entry and procure the preference right thereto. No adverse claim could intervene pending the disposition of Vandike’s original affidavit,

and by allowing the case to proceed, Benjamin was not denied any right nor opportunity to establish his claim.

Your office decision is therefore affirmed.

PRE-EMPTION—FINAL PROOF—PAYMENT—ADVERSE CLAIM.

GROTHJAN v. JOHNSON (ON REVIEW).

A contest between two claimants having been decided, and the right of one of the parties to perfect his pre-emption claim, by the payment of the purchase price within a specified period, having been recognized, his failure to make such payment within said time will not subject his claim to an intervening adverse right, where the delay is satisfactorily explained, and it appears that he tendered payment with his original submission of final proof.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (P. J. C.)

I have before me a motion for review of departmental decision of October 31, 1895 (unreported), filed by counsel for Louise C. Grothjan.

By said decision it was determined that the charges in the affidavit filed by Grothjan against the pre-emption cash entry of Joseph L. Johnson of the SW. $\frac{1}{4}$ of Sec. 1, Tp. 9 N., R. 5 W., Boise City, Idaho, land district, were insufficient to warrant the ordering of a hearing, and affirmed your office decision declining to order the same.

The motion for review does not present any question that was not considered in the former decision. Counsel, however, suggests that the departmental judgment is contrary to the doctrine announced in *Crane v. Stone* (10 L. D., 216). To show the distinction between that case and the one at bar, it is necessary to state herein the facts as they appear in the record before me.

By departmental decision of March 31, 1892, your office decision rejecting Grothjan's final proof and accepting that of Johnson was affirmed. A motion for review was overruled (15 L. D., 195), and a writ of certiorari denied February 21, 1893 (16 L. D., 180).

With the promulgation of the last decision the local officers "were directed to issue final papers to Johnson, 'upon payment of the required purchase money within sixty days from notice.'" The sixty days within which he was required to make the payment expired January 29, 1894. On the next day Grothjan filed an application to make homestead entry of the tract, which was rejected because of Johnson's pre-emption claim on which final proof had been made and allowed. She also filed an affidavit of contest, alleging his failure to make the payment as required by the order, and some other allegations not material to this discussion. Notice was not issued, but the case was forwarded to your office. On February 3, 1894, Johnson tendered the purchase money, but it was rejected, for the reasons that it was not tendered within sixty days as ordered; that the papers had been forwarded to your office; and because of the intervening contest.

Your office, by letter of June 23, 1894, declined to order a hearing on the grounds alleged, and the Department affirmed the judgment, holding that his failure to make payment within the time limited was a question between the entryman and the government, and that the explanation of his failure was satisfactory to the government.

As stated before, this matter was considered in all its phases when the case was originally decided, but the question was not elaborated in the opinion as much as it might have been. The Department was not unmindful of the provisions of section 2264 of the Revised Statutes, which, after fixing the time within which a pre-emption claimant shall file his declaratory statement, and shall make final proof and payment, further provides that:

If he fails to file such written statement, or to make such affidavit, proof and payment, within the several periods named, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

But it appears from affidavits in the record that at the time Johnson made his final proof originally, he tendered payment for the land, which was refused because of the pending protest. It is considered that this tender was sufficient in itself to protect his right, if renewed within a reasonable time after final decision, regardless of any order made by your office, and it was determined that the time within which the second tender was made was not unreasonable.

This position is supported by the United States Supreme Court in *Lytle v. The State of Arkansas* (9 How., 314). In that case Cloyes made final proof and tendered payment, which was refused. The court said:

It is a well-established principle, that where an individual in the prosecution of a right does every thing which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect, was offered to be done.

The rejection by the local officers of Johnson's tender was erroneous. It could not be claimed with any degree of candor that, if his tender had been accepted, as it should have been, any adverse right could have intervened to defeat his right to the land, and having complied with the requirements of the law he is virtually in the same position as though his money had been accepted.

The case of *Crane v. Stone* is not identical with the one at bar. In that case Stone made pre-emption declaratory statement May 23, 1883, and Crane made homestead entry December 2, 1885. On June 5, 1886,

more than thirty-seven months after filing his declaratory statement, Stone made application to make final proof. Crane contested, on the ground that he had not made his final proof within the statutory period—thirty-three months. The Department decided that Stone's failure to make proof and payment within the time limited by statute subjected his claim to the intervening adverse right of Crane. One of the excuses of Stone for not making his proof earlier was that he did not have the money to pay for the land. The Department held that this could not be interposed in the face of an adverse claim, but it might have some weight if it were simply a question between the entryman and the government.

The motion is therefore overruled.

OKLAHOMA TOWN LOT—CONFLICTING RIGHTS.

GILES v. JACKARD.

The right of a town lot claimant, whose failure to maintain actual possession and occupancy is due to armed violence, will not be defeated by the intervening occupancy of an adverse claimant who acquires title with notice of the defect therein.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (C. J. W.)

On February 1, 1894, Joseph A. Giles and Wenzel Jackard each filed application before the townsite board, No. 14, for a deed to lots 9 and 10, block 20, Newkirk, Oklahoma.

On August 29, 1894, a hearing was had before said board to determine the relative rights of these parties, and on September 17, 1894, said board decided the contest and awarded deed to Jackard.

From this decision Giles appealed, and on July 18, 1895, your office reversed the decision of the board and awarded a deed for the lots to Giles. From this decision Jackard appeals, and I have the same now before me.

Both parties appear to be qualified lot occupants. The townsite entry embracing the lots was made January 20, 1894, and at that time Jackard was in possession of the lots, had them enclosed and improvements upon them and is *prima facie* entitled to a deed for them by virtue of his occupancy at the date of the entry. He does not claim to have been the first occupant, but obtained possession of the lots, from one W. G. Pardoe, who sold them to him and made him a quit-claim deed to them.

Giles claims to have purchased lot 9 on September 18, 1893, from one Verbrick, who was its first occupant after the opening, who turned the possession over to him, and lot 10 he claims by virtue of first occupancy and improvements. He seems to have held and occupied the lots, from September 18, 1893, to about October 1, 1893, without any interruption

or adverse claim, and was proceeding with improvements upon them when some parties by the name of Trester, first took possession of an adjacent lot and then proceeded forcibly to eject him from these lots, and to prevent any further acts of improvement.

The Tresters sold the lots to Pardoe and Pardoe to Jackard. The evidence of threats and armed violence upon the part of the Tresters directed against Giles, seems very clear. It is apparent that Giles could neither remain on the lots or make improvements upon them without a fight. It was held in the case of *Smith et al. v. Coplin* (20 L. D., 264) that the right of a town lot claimant is not defeated by his failure to maintain actual possession and occupancy, where such failure is due to threats of force and armed violence.

The real question in this case seems to be whether or not Jackard can be said to be an innocent purchaser without notice of the character of this title and therefore entitled to a deed by virtue of his occupancy and improvements.

Your office found, as matter of fact, that he had actual notice of the defect in the title under which he claims and the testimony though somewhat conflicting seems to support that conclusion. The fact that Pardoe only executed a quitclaim deed was sufficient to put Jackard upon inquiry as to the validity of his title.

Your office decision is accordingly approved.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

SKINVIK *v.* LONGSTREET ET AL.

The right of one who purchases land from a railroad company prior to the passage of the act of March 3, 1887, to perfect title under section 5 of said act, is superior to the settlement right of another acquired after the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, January 18, 1896. (A. E.)

This is an appeal from your office decision of May 14, 1895, rendered in the above entitled cause after instructions contained in departmental decree, dated December 10, 1894. The land involved in the NW. $\frac{1}{4}$ of Sec. 25, Tp. 48 N., R. 14 W., Ashland, Wisconsin.

The decision of December 10, 1894, after holding that the land was excepted from the grant to the Chicago, St. Paul, Minneapolis and Omaha Railroad by the grant of 1856, returned the record for a decision of your office on the questions raised by the application of one Bardon to purchase under the 5th section of the act of 1887 (24 Stat., 556,) the land claimed by Skinvik and Longstreet.

It is from your office decision on these questions that the appeal is now taken.

The record shows that on March 10, 1892, Allen M. Longstreet applied to make homestead entry of the land, while on March 23, 1892, Olaf

Skinvik made similar application. Both applications were rejected because the land was included in that certified to the State of Wisconsin for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, under the grant of June 3, 1856. Longstreet and Skinvik both appealed.

On April 21, 1893, James Bardon filed an application to purchase the land under the 5th section of the act of March 3, 1887. After due publication and notice upon the homestead applicants, Longstreet and Skinvik, Bardon made proof on June 13, 1893, all parties being present.

Bardon showed that he had purchased the land from the railroad company on September 1, 1886, for a valuable consideration, and that he was a citizen of the United States. Skinvik testified that he made his settlement on the land in February, 1892.

In your office decision of May 14, 1895, it was held that the homestead applications of Longstreet and Skinvik should be rejected, and Bardon allowed to purchase the land.

The land in controversy was excepted from the grant by a pre-emption filing on record, but being within the primary limits, it was certified to the State as earned. As the land was not among that advertised to be opened, Bardon can not be held to the ninety days limit within which to assert his claim. Having proved his purchase and that he is a citizen, and Skinvik admitting that he (Skinvik) did not settle until February, 1892, Bardon comes clearly within the 5th section of the act of 1887 (24 Stat., 556), and Skinvik, by reason of the date of his settlement, is not entitled to its provisions.

Your office decision is therefore affirmed.

BRUCKER *v.* BUSCHMAN.

Motion for rehearing granted by Secretary Smith, January 20, 1896. See 20 L. D., 557, and 21 L. D., 114.

WISCONSIN RAILROAD GRANTS—CONFLICTING LIMITS.

PARISH MANUFACTURING CO. *v.* PRINCE.

The decisions of the Department holding that lands within the fifteen mile indemnity limits of the grant made June 3, 1856, to aid in the construction of the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha railroad, and also within the ten mile granted limits of the Wisconsin Central, under the act of May 5, 1864, are excepted from the operation of the latter grant by reason of the withdrawal for the benefit of the former, are reversed by the ruling of the United States Supreme Court in the case of the Wisconsin Central *v.* Forsythe (159 U. S., 46), and lands in such status must now be held to have passed under the latter grant, if free from other claims or rights.

Secretary Smith to the Commissioner of the General Land Office, January 20, 1896. (F. W. C.)

I have considered the appeal by the Parish Manufacturing company from your office decision of August 11, 1894, rejecting its application to

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purchase, under the fifth section of the act of March 3, 1887 (24 Stat., 556), the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 35, T. 48 N., R. 4 W., Ashland land district, Wisconsin.

It appears from the recitation contained in your office decision that this land is within the fifteen mile indemnity limits of the grant made by the act of June 3, 1856, to aid in the construction of the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad, but it is also within the ten mile primary limits of the grant made by the act of May 5, 1864, to aid in the construction of the Wisconsin Central railroad.

Following the prior decisions of this Department it was held that this tract was excepted from the grant to the Wisconsin Central Railroad company by virtue of the reservation created under the act of June 3, 1856, and not being needed in satisfaction of the last mentioned grant, it was restored to the public domain.

The Parish Manufacturing Company appears to claim through John H. Knight, who purchased this land of the Wisconsin Central Railroad Company, and its application to purchase under the act of 1887 was filed February 3, 1891. Due notice was given of the company's intention to submit final proof on March 17, 1891, on which date John R. Prince appeared and protested against the allowance of the application.

On the testimony submitted, the local officers rejected the application to purchase because the tract applied for was embraced in the prior application to purchase filed by John H. Knight.

November 23, 1891, the protestant, John R. Prince, applied to enter this tract, with adjoining land, under the homestead laws, which application was rejected and Prince appealed; but it appears that during the pendency of the proceedings arising upon the application to purchase now under consideration, to wit, on March 18, 1893, Prince was permitted to make homestead entry of this land.

By the decision of the supreme court in the case of *Wisconsin Central v. Forsyth* (159 U. S., 46), the previous construction of this Department as to the effect of the reservation under the act of 1856, upon the grant made by the act of 1864 for the Wisconsin Central Railroad, was reversed, and following the interpretation of the acts of 1856 and 1864, as made in said decision, it must be held that the land in question was a part of that grant to aid in the construction of the Wisconsin Central Railroad.

I further learn, upon inquiry at your office, that this tract is opposite constructed road, so that as far as the record now before me shows, the land in question appears to have passed to the Wisconsin Central Railroad Company, and if this be so, the purchasers from said company are duly protected under their purchase and no right of purchase under the act of 1887 exists.

There may be other grounds, however, for holding this land to have been excepted from the Wisconsin Central grant, and the case is there-

fore remanded to your office that the rights of the Wisconsin Central Railroad company may be adjudicated under the decision of the court above referred to.

FEES—ALLOTMENT OF INDIAN LANDS.

SANBURN AND RUSSELL.

The fees allowable to local officers on Indian allotments, under section 4, act of February 8, 1887, are in the form of a commission, and determined in amount by the price and area of the land, and it therefore follows that such fees can not be fixed and allowed until after survey of the allotted tracts; but it is not essential to the allowance of such fees that the allotments should have been finally approved.

Secretary Smith to the Commissioner of the General Land Office, January 22, 1896.

I acknowledge the receipt of your communication of November 11, 1895, and accompanying copy of letter from Archibald Young, Esq., attorney for J. R. Sanburn, late receiver and J. F. Russell, late register, at the Coeur d'Alene land office, Idaho.

In response thereto I transmit herewith for your guidance an opinion of the Honorable Assistant Attorney General for this Department to whom the matter was referred, dated 13th ultimo which bears my approval.

OPINION.

Assistant Attorney General Hall to the Secretary of the Interior, December 13, 1895. (S. V. P.)

By the reference of the Honorable Acting Secretary of December 3, 1895, I have before me an application on behalf of J. R. Sanburn, late receiver, and J. F. Russell, late register, at Coeur d'Alene, Idaho, for commissions on certain Indian allotments made during their respective terms of office on the validity of which you desire my opinion.

The questions on which an opinion is requested are formulated by the Commissioner of the General Land Office, before whom said application came for action, as follows:

1. Can any commissions be lawfully and properly allowed to registers and receivers on the cash price, or estimated cash price, of lands embraced in Indian allotments before they have been surveyed?

2. Can this office properly conclude that lands which satisfactorily appear to be within the forty mile limit of the Northern Pacific Railroad grant (and therefore to be double minimum lands), but which have not yet been surveyed, or the surveys of which have not yet been approved, are actually double minimum, and allow commissions for Indian allotments located thereon as such?

3. Can commissions be allowed to registers and receivers on the cash price of lands allotted to Indians, before the allotments have been approved?

4. In case a supplemental account is stated allowing the late register and receiver at Coeur d'Alene commissions as of double minimum lands on the allotments referred to, should such commissions be computed on the area allowed on the original allotment, or on the corrected area as approved to conform to legal subdivisions?

The claim made herein arises under the fourth section of the general allotment act of February 8, 1887 (24 Stat., 388), which makes the following provisions:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Section 4, act of February 28, 1891 (26 Stat., 794), amendatory of the general act, contains a similar provision with respect to fees.

It may be properly asked at the outset what are the "fees" of the local officers when lands are "entered under the general laws?"

1. In the case of homestead entries the law provides for "fees" and "commissions." The "fee" of ten dollars for an entry of one hundred and sixty acres goes to the government, and the commission of one per cent, at one dollar and twenty-five cents per acre, to each of the local officers, both fee and commission payable, by the homesteader, at date of application. On final entry, the homesteader pays a like "commission," but no "fee." If the land is double minimum, the commission is reckoned accordingly. (Sec. 2238, Revised Statutes.) Here it will be observed the "commission" is the fee, and the only one, received by the local officers for allowing the entry, the term "commission" being apparently used to distinguish between the fee paid to the government and the one paid to the local officers.

2. In timber-culture entries the law fixes the fees of the local officers at two dollars each, at first and final entry, irrespective of the area entered, or the price of the land. A government fee of ten dollars for an entry of one hundred and sixty acres is also paid by the entryman when the original entry is allowed. (Act of June 14, 1878, 20 Stat., 113.)

3. In pre-emption entries, and other entries initiated of record by declaratory statement, a filing fee of one dollar each to the local officers, to be paid by the settler, is provided for, and one per cent commission on the purchase price is also paid to said officers by the government. (Sec. 2238, Revised Statutes.)

4. In cash entries, one per cent commission on the purchase price is paid by the government to the local officers as their fee therein. (Sec. 2238, Revised Statutes.)

In certain States (including Idaho), the local officers receive fifty per centum on the fees and commissions, payable by entryman under the pre-emption and homestead law.

It will be seen from the foregoing, that the "fees" of the local officers as derived from entries under the "general" laws, at the date of the allotment act, are of two kinds, one paid as an arbitrary fee, and the other as a commission, dependent upon area and price of land, and that when the government pays the "fee," it is always in the form of a commission.

It would therefore seem that the fee allowable for allotments must also be in the same form, and determined in amount by the price and area of the land, as the fee in this instance is payable by the government.

Having reached the conclusion that the fees allowable herein are in the nature of a commission to be determined by the price and area of the land, the first and second questions must be answered in the negative. The official survey of the land is prerequisite to a determination of the actual area of an entry, as well as the price of the land as fixed with respect to railroad limits.

The third question should be answered in the affirmative. If the lands have been surveyed, there is no reason why the settlement of the account between the local officers and the government should be deferred until the allotments have been approved. The commissions allowable in cases of entries under the general land laws are not, as I understand, determined by the final approval of such entries, but by the transaction of the business in the local office.

The fourth question is, in effect, answered in the response to the first and second. As the commission can only be known after the lands have been surveyed, it follows that the account should be stated in accordance with the area of the entry when adjusted to the survey.

Approved:

HOKE SMITH,

Secretary.

INDIAN LANDS—APPRAISEMENT—LOSS OF IMPROVEMENTS.

ABRAM N. MITTOWER.

Where Indian lands and the improvements thereon have been separately appraised in accordance with the terms of the act of March 2, 1889, and the Indian has accepted such appraisement, and been removed from the land, as provided in said act, there is no authority for the sale of said property for less than the whole amount of the appraisement, even though the improvements were subsequently destroyed.

Secretary Smith to the Commissioner of the General Land Office, January 22, 1896.

I acknowledge the receipt of your letter of July 29, 1895, asking instructions in the case of Abram Mittower, who applies to purchase certain lands in the Bitter Root Valley, Montana, patented to certain

members of the Flathead band of Indians, under the provisions of the act of March 2, 1889, (25 Stats. 871).

In response thereto I transmit herewith an opinion dated November 20, 1895, from the Hon. Assistant Attorney General for this Department who advises me that the act above referred to forbids the acceptance of the application or sale in any case at less than the appraised value of both the land and the improvements but if the lands without the improvements is not worth the appraised value of both and cannot be sold at that figure, the matter should be reported to Congress with appropriate recommendations.

In the opinion of the Assistant Attorney General I concur.

OPINION.

Assistant Attorney General Hall to the Secretary of the Interior, November 20, 1895. (E. E. W)

By your reference I have before me the letter of the Commissioner of the General Land Office of July 29, 1895, asking to be advised in the matter of the application of Abram N. Mittower to purchase the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, T. 8 N., R. 20 W., under the provisions of the act of Congress approved March 2, 1889, entitled "An act to provide for the sale of lands patented to certain members of the Flathead band of Indians in Montana Territory, and for other purposes." 25 Stats., 871. This act provides:

SEC. 1. That the Secretary of the Interior, with the consent of the Indians severally, to whom patents have been issued for lands assigned to them in the Bitter Root Valley, in Montana Territory, under the provisions of an act of Congress approved June fifth, eighteen hundred and seventy-two, entitled "An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley, in the Territory of Montana," or the heirs at law of such Indians, be, and he hereby is, authorized to cause to be appraised and sold, in tracts not exceeding one hundred and sixty acres, all the lands allotted and patented to said Indians; said lands shall be appraised as if in a state of nature, but the enhanced value thereof, by virtue of the settlement and improvement of the surrounding country, shall be considered in ascertaining their value: *Provided*, That the improvements thereon shall be appraised separate and distinct from land. * * *

SEC. 2. *Provided*, That no portion of said lands shall be sold at less than the appraised value thereof.

SEC. 3. That the net proceeds derived from the sale of the lands herein authorized shall be placed in the Treasury to the credit of the Indians severally entitled thereto, and the Secretary of the Interior is hereby authorized to pay the same in cash to original allottees and patentees, or the heirs at law of such, or expend the same for their benefit in such manner as he may deem for their best interest.

SEC. 4. That when a purchaser shall have made full payment for a tract of land, as herein provided, and for the improvements thereon, patent shall be issued as in case of public lands under the homestead and preemption laws.

SEC. 6. That in the event of the sale of the lands herein authorized it shall be the duty of the Secretary of the Interior to remove the Indians whose lands shall have been sold, to the general reservation, known as the Jocko Reservation, in the Territory of Montana.

The Commissioner states that on the 13th of March, 1876, a patent was issued to a Flathead Indian named Peter Brown for the land described in this application. The report of the special agent appointed to make the appraisements and procure the consent of the Indians shows that Brown did not accept the patent, and that on or before the 29th of January, 1890, he consented in writing to the appraisement and sale of his land, and removal therefrom, as provided in the said act of Congress. This report also shows that Brown's improvements consisted of a cabin, a root house, a stable, and two miles of fencing, the latter out of repair; that the appraisement was made on or before the said 29th of January, 1890; that the land, exclusive of the improvements, was appraised at \$11 per acre, aggregating \$880, and the improvements separately at \$440. A copy of a telegraphic report made by this special agent on the 19th of October, 1891, which the Indian Division has furnished me for my information, shows that he had on or before that date "delivered the entire Flathead band" at the agency in Montana.

On the 5th of March, 1895, the applicant, Abram N. Mittower, filed an application to purchase the land, and submitted proof that since the appraisement the cabin and stable had been destroyed by fire, and the root house and fence blown down and rotted so as to be of no value whatever. He tenders the appraised value of the land, exclusive of the improvements, and demands patent. The Commissioner states that he knows of no authority to exclude the value of the improvements, and asks for advice. The Commissioner of Indian Affairs, to whom the matter has been referred, holds, in a letter dated August 27, 1895, that the improvements being destroyed, the land may be sold for its appraised value, exclusive of the value of the improvements, and recommends acceptance of the application.

The proviso in the second section of the act expressly forbids sale of any portion of this land at less than its appraised value. Unquestionably this means the appraised values of both the land and the improvements. This is the more evident because it is not entirely a matter between the applicant and the government. The Indian has rights in the case which cannot be overlooked. He is conceded to be the owner of the land, and the improvements were also his, as absolutely so as the soil. He had made them, it is to be presumed, by his own labor, or with his own money, and they were not only his in fact, but in law they were a part of the land. By procuring his acceptance of the appraisements, his consent to the sale of the land, and by taking possession of the premises and removing him therefrom prior to the destruction of the improvements, the government became trustee to sell the property for his benefit, and responsible to him for its total appraised value.

Evidently, the reason for appraising the land and the improvements separately was to ascertain and fix the true value of both, considered

as one property, and not to provide for their sale separately, or at less than the appraised value of both. By the special agent's appraisal of both, and the Indian's acceptance thereof, the price which he was to receive for the whole property, and at which the government as trustee was authorized to sell it, was determined and agreed on. The moment the Indian accepted the appraisal, consented to the sale, and was removed from the premises by the government, his right to compensation at the total appraised value when sale was made became fixed and binding, and he cannot be made to suffer any loss because of the subsequent destruction of the improvements. But if the offer of the applicant is accepted, how will the Secretary make good the \$440 for the improvements? Obviously Congress would have to provide the way. But if the land without the improvements is not worth the appraised value of both, or cannot be sold at that figure, I would advise that the matter be reported to Congress, with appropriate recommendations.

In my judgment the act forbids the acceptance of the application, or sale in any case at less than the appraised value of both the land and the improvements.

Approved:

HOKE SMITH,
Secretary.

SIoux HALF BREED SCRIP—DUPLICATE ISSUE.

SEYMOUR LABATHE.

The Department has authority to issue duplicate Sioux half breed scrip, in lieu of scrip lost or destroyed.

Secretary Smith to the Commissioner of Indian Affairs, January 23, 1896.

I acknowledge the receipt of your communication of November 18, 1895, relative to the application of Seymour Labathe for the issuance of duplicate certificates of Sioux Half-Breed scrip, under the Act of July 17, 1854.

In response thereto, I transmit herewith for your guidance an opinion of the Honorable Assistant Attorney General for this Department, dated November 26, 1895, in which I concur, wherein I am advised that the Department has authority to issue a duplicate or copy certificate of scrip for lost or destroyed scrip issued under said act, and should do so in a proper case made.

OPINION.

Assistant Attorney General Hall to the Secretary of the Interior, November 26, 1895.

I have, by your reference of the 21st instant, the application of Seymour Labathe for the issuance to him of duplicate or copy certificate

of scrip as a mixed blood Sioux Indian, and upon the question of the authority of the Department to issue such duplicate or copy you ask for my opinion.

It appears from the papers submitted to me that Seymour Labathe was a minor at the date of the act which authorized the issuance of such certificate or scrip, and for some time thereafter. That scrip was issued in his name, No. 340, letters A, B, C, D and E, aggregating four hundred and eighty acres of land, and delivered to his father, Francis Labathe. Letters A, B and D were located and satisfied upon lands aggregating two hundred and forty acres.

The applicant supports his application by proof that the scrip represented by letters C and E never came into his hands; that the same have never been transferred by him, and that no one has located the same for him. He makes application for the issuance of duplicates or copies of letters C and E.

I have read carefully the communication of the Commissioner of Indian Affairs touching this application. He bases his recommendation adverse to applicant upon the action of the Department taken in 1873 in reference to issuing duplicate certificate for Sioux half breed scrip.

I have carefully examined the letter of the Commissioner of the General Land Office to the then Secretary of the Interior and the action of the Secretary thereon. I do not agree with the position taken by the then Commissioner of the General Land Office that there is a want of authority in the Department to issue duplicate or copy certificates of scrip on a proper case made for such issuance. Such power is inherent in the Department, and the exercise of it is necessary in order to fulfill the obligation of the government to these Indians.

The act of Congress approved July 17, 1854, provided that each Sioux Indian of the mixed blood or half breed should upon a relinquishment of his interest in the reservation receive four hundred and eighty acres of land, and authority was therein given to issue scrip to each of said Indians as authority for locating the quantity of land guaranteed to him by the United States.

The Secretary of the Interior is charged with the execution of that law, and with seeing to it that each Indian entitled to the provisions of the act of July 17, 1854, *supra*, should receive the quantity of land thus given to him in exchange for his interest in the reservation.

If the Secretary of the Interior is satisfied that any Indian has not received the full amount of land to which he is entitled, it would be his duty to take proper steps to enable such Indian to obtain the same. If it be true that letters C and E have never been located, and that they are lost or destroyed, it would seem that the Department is lacking in the full performance of its duty when it refuses to issue duplicate or copy scrip, that this Indian may have the quantity of land guaranteed to him by Congress. The case would stand thus: The United States government has the Indian's relinquishment of his

interest in the reservation. It promised to give him four hundred and eighty acres of land for that interest, and it has enabled him to acquire two hundred and forty acres, but refuses to aid him in obtaining the balance due him, simply because there cannot be found any act of Congress expressly directing that duplicate or copy scrip may be issued.

I do not believe that the Department should put itself in such attitude toward this Indian, but that he should receive as speedily as possible the full benefits of the act of Congress of July 17, 1854, *supra*. There could not possibly be any injury to the government resulting from this course. The act of Congress above cited expressly prohibits the transfer of this scrip, and if any person other than the applicant should be in possession of this scrip he could never use it for the purpose of locating land, unless the location is made in the name of the Indian, and the application for patent would be made in his name. If the duplicate or copy scrip should be located and a patent issued thereon, and the original should afterwards turn up in the hands of some one who professes to locate it for the Indian, the second location would be rejected and patent refused. The Department decided just such a case in *ex parte* Bourke, 12 L. D., 105.

I therefore advise that the Department has authority to issue a duplicate or copy certificate of scrip for lost or destroyed scrip issued under said act, and should do so in a proper case made.

Approved:

HOKE SMITH, *Secretary*.

SIoux HALF BREED SCRIP—DUPLICATE ISSUE.

CHARLES D. MOUSSO.

The act of July 17, 1854, authorized the issuance of scrip to the Sioux half breeds in payment for their interest in the reservation purchased by the government, on due relinquishment of such interest, and where it appears that such scrip was procured on a forged power of attorney, and relinquishment of like character, and was afterwards located and the entry carried to patent all without the knowledge or consent of the rightful claimant, and that he has in fact received no benefit therefrom, nor executed the requisite relinquishment, the right of said half breed to receive new, or copy scrip should be recognized, and his relinquishment secured.

The cancellation of the patent procured on the scrip secured through the fraudulent power of attorney and relinquishment is a matter that must be determined as between the United States and the person procuring such patent and those holding thereunder.

Secretary Smith to the Commissioner of Indian Affairs, January 23, 1896.

The matter of the claim of Charles D. Moussso for the issue of certain Sioux half-breed scrip has been resubmitted to the Assistant Attorney General for this Department, and has been re-examined by him.

When the matter was first under consideration it was concluded that it was at least doubtful if this Department had authority to accept Mouso's relinquishment then tendered, and issue him scrip according to his petition, and in view of this doubt it was decided to deny the petition. It was further held that the proper plan of procedure was to institute suit to set aside the patent which had been issued in his name, and the papers in the case, with the opinion of the Assistant Attorney General were submitted to the Department of Justice, with the request that suit be instituted in the proper court to cancel said patent.

The matter was again submitted to this Department by the Honorable Attorney General, together with certain letters of the United States district attorney for Nevada, with a request for an expression of the opinion of this Department as to whether the case should be prosecuted. When these papers were submitted to the Assistant Attorney General for this Department he, upon a re-examination of the whole matter, rendered an opinion still holding that the suit should be prosecuted, but upon the other point as to the right of Mouso to have scrip issued to him, he arrived at a different conclusion, holding that this Department has the authority to issue him new or copy scrip, and that it would be its duty to do so. I have approved this opinion and transmit the same herewith.

The petition of Mouso for scrip will be granted, and you will take such steps as may be necessary in connection therewith, and in accordance with the views expressed in said opinion.

The papers in the case have been returned to the Department of Justice, to be used in connection with the suit to cancel the patent heretofore issued.

OPINION.

Assistant Attorney General Hall to the Secretary of the Interior, November 26, 1895.

On June 30, 1893, I furnished you an opinion advising that suit be instituted to cancel a patent which had been issued to Charles Musso, a half-breed Sioux Indian. Acting upon this opinion, you requested the Attorney-General to institute suit for that purpose. After some correspondence with the United States attorney for the district of Nevada, the Honorable Attorney-General, on May 18, 1895, submitted the letters of the district attorney to you, and requested an expression of opinion by your office as to whether the case should be prosecuted.

On the 19th instant you submitted to me this correspondence, with request "for an opinion as to whether said case should be prosecuted."

I have re-examined all the papers relating to the matter, and I adhere to my former opinion, that the case should be prosecuted, for it is very clear that one Chapman, claiming to act as attorney in fact

for Musso without Musso's authority or consent, obtained possession of the scrip issued in the name of Musso, and caused patent to be issued accordingly.

Chapman claimed to act under a power of attorney, which he says was made to him by a person claiming to be Charles Musso, and entitled to Sioux half-breed scrip, but the papers before me show conclusively that Charles Musso never executed a power of attorney to Chapman, or anyone else, and that he never had possession or control of the scrip issued in his name.

Whether such sales and transfers of the property have been made since the issuance of patent that would defeat a recovery, I am unable to determine. This can best be determined by the Attorney-General on information that he may derive from the United States district attorney, or, perhaps, can not be satisfactorily determined until a suit is instituted and tried. Certain it is that unless some such obstacle is in the way, I can see no reason why a suit may not be successfully prosecuted.

I have read very carefully the communication of the Honorable Commissioner of Indian Affairs upon this subject. He is of the opinion that Musso has been guilty of such laches as would defeat a successful prosecution of the case. I do not take this view of the question. In the first place, the case will not be prosecuted on behalf of Musso or in his name but on behalf of the United States, and I am unable to see how Musso's laches, if such be attributable to him, could defeat the action of the government in setting aside a patent to a fraudulent location.

Judging from the papers submitted to me I do not believe that Musso has been guilty of laches such as would forfeit any rights he might have against the United States. The census roll of the Sioux half-breeds and mixed bloods was made up and reported to the Indian Office on February 9, 1856, pursuant to the act of Congress approved July 17, 1854. This roll contained the name of Charles Musso as No. 290, and in his name five pieces of scrip, No. 301 A, B, C, D and E were issued, for four hundred and eighty acres of land in the aggregate. This scrip was taken possession of by the special commissioner of the government, whose duty it was to secure deeds of relinquishment from the Indians and deliver to them their scrip. These certificates were not delivered by such special commissioner, but, together with other pieces of scrip, were returned by him to the Indian Office. On December 10, 1860, this scrip, together with others, which had not been formerly delivered, were sent to the superintendent of Indian Affairs at St. Paul, Minnesota, with instructions to give public notice that he held the same for delivery, etc. On January 1, 1864, this scrip No. 301 was reported as delivered. It was delivered to one W. S. Chapman, who claimed to be the attorney in fact of Charles Musso, upon a paper purporting to be a power of attorney executed by Musso on July 9, 1863,

in Hennepin county, Minnesota. Chapman, claiming to act as attorney in fact for Musso, and by virtue of a so-called power of attorney, executed a relinquishment of Musso's interest in the reservation to the United States. On March 1, 1864, the scrip was located at Carson City, Nevada, upon lands in that district, by Chapman, claiming to act as attorney in fact for Musso. Patents for the lands covered by these locations were issued in 1864 and in 1866.

Thus the matter stood until 1892, when Charles Musso tendered a formal relinquishment of his interest in said reservation, and asked for certificates of scrip for four hundred and eighty acres of land in exchange therefor.

There is no doubt that Charles Musso who presents this application is the identical and only Charles Musso who is entitled to half-breed Sioux scrip, as appears from the census roll reported February 9, 1856. The record shows that in June, 1855, Charles Musso left the State of Minnesota and did not return until 1885. He left Minnesota prior to the making up of the census roll of the half breed Sioux Indians. On the census roll his name is given as "Charles Musso," while his correct name is Charles D. Mousso. This indicates very clearly that his name was reported to the commissioner by other Indians. That he was entitled to go on the census roll, there is no question, and I merely refer to this fact to show that it is doubtful whether he was cognizant whether a roll was ever made up. He accounts for himself from June, 1855, until March, 1885, showing that he was in the South up to the outbreak of the civil war in 1861, when he entered the Confederate army. He served in the Confederate army until the close of the war, and then located at Demopolis, Alabama, where he remained until he returned to Minnesota in 1885. He states, and there is nothing in the record to contradict him, that he first heard of his right to lands on his return to Minnesota in 1885; that he inquired into the matter and found that his name was on the census roll and that he was entitled to four hundred and eighty acres of land. He at once took steps to have his claim presented to the government for the lands to which he was entitled, under the act of Congress of 1854.

These facts seem not to be controverted by any evidence whatever in the record. And, if they be true, he certainly will be acquitted of the charge of laches in this matter.

In the opinion which I submitted to you on June 30, 1893, after stating that the scrip had been located in the name of "Musso" and patent also issued in his name, which is still outstanding, I expressed doubt as to the authority of the Department to issue new or copy scrip until that patent has been duly canceled upon judicial decree, or until Congress should have authorized the issuance of other scrip.

But after more mature deliberation upon this subject I have reached the conclusion that the Department has the authority to issue to Mousso new or copy scrip, and that it would be its duty to do so.

Moussou is a Sioux Indian of the mixed blood and was an owner, in common with other Indians of his tribe, of the reservation purchased by the government from that tribe, for which purchase the United States obligated itself to give to each of the Indians four hundred and eighty acres of land. The act of Congress of July 17, 1854, *supra*, which authorized such payment for the reservation so purchased, required the Secretary of the Interior to execute its provisions. The act of Congress authorized the issuance of scrip to each Indian showing the quantity of land he was entitled to receive from the United States, and expressly prohibited the assignment of such scrip.

Moussou, it appears from the records, never relinquished his interest in said reservation to the United States, and never received scrip, that he might locate the amount of land given him by the act of Congress, nor has he received any benefit therefrom. The government is in possession of the reservation in which he had an interest, and delivered the scrip to which he was entitled to a person who had no authority to receive it for him. The obligation of the government to this Indian is to convey to him four hundred and eighty acres of land. The government cannot avoid a discharge of this obligation by setting up the fact that another person had obtained from the government agent the scrip to which Moussou was entitled, located the land in his name, and procured a patent to issue for the same. He is not responsible for the act of the government agent who delivered the scrip on the forged power of attorney, nor is he at fault that such person acting on the forged power of attorney located land in his name and obtained patent therefor. This is a matter between the government and the person who thus made the location and obtained the patent. It would be, in my opinion, injustice to Moussou to say in reply to his application: the government has disposed of the lands to which you are entitled, to another person, who assumed to act for you, and although it is now clear that he had no such authority, yet you must be delayed in receiving the lands to which you are entitled until the government can institute suit to cancel that patent, and your right to get land at all must depend upon the successful termination of that suit.

In my opinion, new scrip, or a copy of the old scrip, should be issued to Moussou, and he be permitted to locate four hundred and eighty acres of land, as the law provides, upon his filing relinquishment in due form of his interest in the reservation. The question of the cancellation of the patent should be left a matter entirely between the United States and the person who obtained it, and those holding under him.

Approved:

HOKE SMITH,

Secretary.

OKLAHOMA LANDS—SETTLEMENT RIGHT—BOUNDARY OF TERRITORY.

HURD *v.* RATTS.

On a charge that an entryman entered the Territory in advance of the hour fixed therefor it is incumbent upon the contestant to show such fact by a clear preponderance of the testimony.

In the case of a non navigable stream fixed as the boundary of a State, the middle of such stream, as reckoned from its natural standing banks, is the actual boundary line.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1896. (C. J. W.)

April 26, 1889, Oliver N. Ratts made soldier's homestead entry No. 184, Kingfisher series, for S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 3 and 4, Sec. 3, T. 11 N., R. 4 W., Oklahoma.

April 20, 1891, two years thereafter, Nova-zembla Hurd filed his affidavit of contest, alleging that Ratts did enter on and occupy a part of the lands declared open to entry and settlement by the act of March 2, 1889, and the President's proclamation of March 23, 1889, after March 2, 1889, and before noon of April 22, 1889.

A hearing was had before the register and receiver, and on June 9, 1892, they rendered a decision finding that Ratts had entered the territory during the prohibited period and recommending the cancellation of his entry.

On July 2, 1892, Ratts filed a motion for review of said decision and on January 21, 1893, the register and receiver, on review, reversed their former decision and recommended that the contest be dismissed.

On February 6, 1893, Hurd appealed from this decision.

On June 5, 1893, your office passed upon said appeal, affirming the finding of the local officers and dismissing the contest.

On June 21, Hurd filed a motion for review of said decision.

On October 25, 1893, your office considered said motion, reviewed its former decision, reversed the same, and held Ratts' homestead entry for cancellation.

From this decision Ratts appealed, and on May 18, 1895, said appeal was passed upon here and your office decision affirmed. In due time Ratts moved for a review of said last named departmental decision, which motion was allowed and I have the same now before me.

This summarized history of the case up to the present time, indicates a case of doubt and difficulty. An examination of the record, discloses a mass of testimony somewhat conflicting and not easy to be reconciled. An examination of the decisions complained of shows that the questions of law dealt with are such as have elicited conflicting decisions from the courts. The case, therefore, demands patient and careful review.

It will be observed that the charge against the defendant is that he

was a "sooner." The settlement of the question involves: first, a careful analysis of the testimony and next the interpretation of such questions of law as are made applicable by the peculiar state of facts. In this, as in most cases, the facts must control the case. In order that nothing of significance in the body of evidence may escape due consideration, the facts deemed pertinent to the different phases of the case have been grouped with a view to their more convenient and intelligible application. The contention of contestant is, that Ratts entered the territory a short time before noon on the day of the opening and is, for that reason, disqualified. In order to sustain his contention testimony was offered tending to show the time of the start from the south bank of the South Canadian river; the time at which certain points on the way were passed; and the time of Ratts' arrival at the land.

He entered the territory from the south side of the South Canadian river, which river was the southern boundary of the territory opened to settlement and entry on April 22, 1889, near the upper Barrows Crossing. The start was made from a sand bar, or island, in the river bed. From this point Ratts rode one horse and led another, traveling slightly west of due north, to the North Fork of the Canadian river, ten miles. There he hitched his horse, disrobed, crossed the stream by means of fallen trees, and ran about half a mile to the land in question and made his settlement. The following is a summary of the testimony from which the time of leaving the sand bar must be fixed:

There is considerable difference of opinion as to how many persons were waiting on and near the sand bar near Barrow's Crossing before the hour of noon on April 22, 1889.

The lowest estimate is that of witness Williams on page 18, who says there were twenty-five or thirty, may be more. Witness Stanley says, page 28, there were about seventy-five or one hundred. Witness Bailey says, page 42, there were fifty or sixty. Witness Jameson says, page 67, there were between forty and fifty, may be more. Witness Rockwood says, page 69, "there were from seventy-five to one hundred and fifty. There was a very large crowd."

A number of the crowd assembled on the bank, waded through water knee deep to a sand bar. Ratts, the defendant, says, page 73, between sixty and one hundred of them went to the sand bar. Witness Williams says, the large majority of the crowd went to the sand bar leaving on the bank some four or five he supposes. Among those who crossed and started from the sand bar was Ratts, the defendant.

Witness Williamson says, page 26, it [the sand bar] was not over fifty yards from the south bank of the river nor over one hundred and twenty-five steps from the north bank. It was nearer the south bank than the north bank. He says further, that the deepest water was crossed before reaching the sand bar. He does not think there was any running water between where they stopped on the sand bar and high-

est bank on the north of the river. On the south side of the sand bar there was water in various low places. Ratts says, page 75, water was flowing on the north side of it. Witness Beucher says, sand bar was one hundred and fifty feet from the south bank. About two hundred and fifty or three hundred feet from the north side. The largest part of the channel of the river was on the south side. Witness Williamson says, page 66, that the sand bar was on the north side of the river, the channel running south and south-east of it. Ratts says, page 79, quite a good deal nearer the south side of the river. The channel was flowing on the south side of the sand bar.

The crowd upon the border had time-pieces that differed. The question arose with the crowd what to do about it. Witness Ratts, page 74, says: "Some man got up and made a talk. I do not know who he was. Said we would have to start by some man's time. There was a gentleman there, in a sulky, said he had meridian time and had just come from Purcell." They put it to a vote to the crowd to go by his time and every man agreed to go by his time. Ratts had a watch that was fifteen minutes faster than this Purcell time. He set his watch back to agree with the other. The crowd crossed to the sand bar before twelve o'clock. Witness Williams said, page 19: "The supposition was that we crossed onto this sand bar and there waited until 12 o'clock. We waited there until a gun was fired in the crowd." Same witness says, page 20:

We were still south of the high bank, meaning the north bank of the river, until this gun was fired. Those who started from the bank and those who started from the sand bar started at the same time. If the rest did not start until noon, Ratts did not start from the sand bar until noon. If Ratts started from the sand bar before noon, then the whole crowd started before noon.

No witness was willing to swear absolutely that he knew of his own personal knowledge that the signal was given at 12 o'clock, but it was the general understanding that it was to be given at 12 o'clock and the general understanding and belief that it was. When the signal was given Ratts went north across the prairie riding one horse, and leading another, with a light pack. The land between the two forks of the Canadian river is nearly level, sloping slightly toward both rivers. A good many persons accompanied him across the prairie. Seven of them says George Beucher, page 54, were of his own party. They reached the river, Ratts says, page 81, at 44 minutes after 12 o'clock, and adds: "I looked at my watch after I got undressed. I was, perhaps, between a half a minute and a minute undressing. It was just 45 minutes after twelve." Witness Williams, page 23, in answer to question: "How long did it take you and Ratts to ride over to the Canadian river?" says: "I suppose forty or forty-five minutes." Ratts, according to Beucher, page 68, took off his clothing, except his under clothing from his waist down, and his hat, and crossed the river, having tied his horses on the south side of the river. Witness Sumner, page 2, said he came up from the river with nothing on but a handkerchief on his head. Witness Gra-

ham said he had on nothing but his under clothing and his hat upon his head, and a pair of boots on.

Having crossed the North Canadian river with the aid of trees that had fallen partly across it, Ratts ran a distance of about one-half mile to the land in controversy. After remaining there about half an hour he returned to the North Canadian, recrossed it, put on his clothes, and returned to the land in controversy.

Joe Williams, principal witness for the contestant, contends that it was not yet twelve o'clock when the signal was given for the start from the sand bar. He and Ratts crossed the river in company. He says he had no time; that there was a man there that told him it was twenty minutes past eleven. This man who gave him the time, said it was not twelve o'clock; "that is all I knew about what time it was" (page 20). Again he says: "Just like I told you, I have only that man's word for the time of day and according to his time it was not twelve. This remark was made before leaving the bank to go to the sand bar. I do not think it was more than fifteen minutes from the time we started from the south side until the gun was fired. Mr. Ratts left the sand bar at the same time I did." This is the only witness among those at the starting point who thinks the crowd started before twelve. According to his opinion they started thirty-five minutes after eleven o'clock.

Joe Williamson was one of the crowd on the south side of the South Canadian river on the forenoon of April 22. Saw Ratts there in the neighborhood of eleven o'clock, packing his horses getting ready to go to the ford. Witness crossed with the rest; crossed by the time they all crossed and at the signal given at the main ford. It was then twelve o'clock by his son's watch and his son was always a truthful boy. If the watch was correct it was twelve o'clock when witness and the rest crossed the river. (Page 64.) Witness made the run and stopped at the land now claimed by him (witness) about three miles from the place of starting. Shortly after reaching his place he saw Ratts and several companions pass said place. Is sure it was Ratts. Had seen him for about two months almost every day. There were eight or ten persons with Ratts and many others scattered all over the prairie, riding. It was a few minutes after twelve o'clock when he saw Ratts pass. Supposes about fifteen or twenty minutes after he started from the river.

From Williamson's place, two and a half or three miles north of the South Canadian, Ratts and his comrades rode on six or six and a half miles until they reached within a short distance of the North Canadian river, when Witness Williams says they met a man named Porter Drace (page 16). Williams says "it was within a mile or a mile and a half of the place where we crossed the North Canadian." He says they met him about eighteen minutes before twelve. Drace did not tell witness then what time it was but witness made the inquiry a month, or such a matter, after that. "He told me that by his watch it

was eighteen minutes before twelve o'clock. He told me, I suppose, a month after that, about." (Page 24.) Witness received, as compensation, his expenses and the usual fees and \$50, additional.

Jessie Sumner testifies that at twelve o'clock by the signal the soldiers gave from Council Grove (page 1), supposed to be for noon on April 22, he was about half a mile from the land in controversy. Ran to the land. Reached it in about five minutes. Saw Ratts about five, ten, or fifteen minutes after twelve, coming up from the river nearly naked. Had a little conversation with him. Witness had no watch nor other means of knowing that the signal he heard was given at twelve o'clock, except an ordinary pocket compass. Made an observation of the time of day with that, and judge that it was about fifteen minutes before twelve. About fifteen minutes after making the estimate he heard the signal and judged that it was about noon. Made no allowance for magnetic variation of the compass.

George F. Graham testified that he and Mr. Mosely being in Council Grove on April 22, 1889, crossed the river and went onto his claim, to the best of his judgment, about quarter after twelve o'clock. He had been there but a few minutes when two men came up out of the bottom. "I asked him his name and he said his name was Ratts."

No witness, except Sumner, says anything about any signal from the soldiers of Council Grove.

It is clear to my mind from this testimony that all the crowd near the Barrow's Crossing, both those on the bank and those on the sand bar, started by the same signal and at the same time, and that Ratts started with them. It is also shown that every one, except the witness Williams, supposed, and believed, it to be twelve o'clock when the signal was given. The reason for that belief seems to be quite as well founded as those upon which Williams bases his contrary belief. It is safe, however, to say that the testimony taken altogether, leaves the precise time of leaving the sand bar in doubt.

The contention of the contestant is that the start was made before noon and the burden is upon him to show that fact by at least a clear preponderance of the testimony. It is not sufficient to simply raise a doubt as to the exact time of starting on the race, especially where all the crowd started together and were apparently acting in good faith, and where the contest is initiated two years after the race and settlement and by one who was not at the time a competitor, as in this case.

The testimony of Graham and Sumner, whose testimony relates to the time and circumstances of Ratts' arrival at the land at the end of his race, supports, it is contended, Williams' testimony as to the time of starting from the sand bar. Two things are to be noted in connection with Sumner's testimony. One is that he seems to have been making a run from an unauthorized starting point, and the other is that his estimate of the time was based upon an observation made with a pocket compass and upon the firing of a gun, supposed by him

to be a signal for the opening, fired by a soldier on Council Grove reservation. This is the only intimation of a signal given at that point, to be found in the record.

First, as to the pocket compass: Sumner swears he made no allowance for magnetic variation. The magnetic needle points directly north at only one meridian on the American continent, to wit, just east of Pittsburg, Pennsylvania, near Charlottesville, Virginia, and Wilmington, North Carolina. At all places east of the line, the magnetic needle varies from the true meridian in that the north pole of the needle points a little to the west; at places west of this line the north pole of the compass points too far east. See American Encyclopaedia, Vol. V., page 187.

In Oklahoma the north pole of the needle points too far east by a fraction over nine degrees. Conversely the south pole points too far west by about nine degrees. See McKinney townsite plat sent by Commissioner with letter of July 17, 1895. When the sun indicates the real meridian in Oklahoma, the earth must travel nine degrees further to reach the magnetic meridian, or noon, as indicated by the compass. The earth moves at the rate of one degree in four minutes, or nine degrees in thirty-six minutes. Therefore when the compass, as used by the witness, indicated noon in Oklahoma, it was in reality thirty-six minutes after twelve. As he says Ratts came up from the river fifteen minutes after twelve, as indicated by the compass, it was in reality twelve o'clock and fifty-one minutes.

The observation which the witness made with the compass when corrected by making allowance for the variation, will correspond with Ratts' testimony to within five minutes. But the witness also took into account the firing of a signal-gun on the timber reservation. I find myself unable to conclude that this was a signal gun, or that it indicated the time. It was ten miles or more from the border line in the interior. It was not a cannon, but an ordinary gun. It could be heard by no one on the border. The race could be made lawfully only from the border lines. A signal fired thus in the interior, could be of no use to those ten miles distant on the border.

In the absence of other testimony than the mere supposition of this witness, the firing of the gun on the timber reservation will not be regarded as indicating the time of day, or as an authorized signal for entering the territory.

The other witness, Graham, leaves the time indefinite and merely expresses an opinion without disclosing any reason or basis for it. The testimony of Williams must support the theory that Ratts entered before twelve o'clock, noon, if it is supported at all. He says that in his opinion it was eleven o'clock and thirty-five minutes when they left the sand bar. That they were forty or forty-five minutes covering the distance between the two rivers. Says they met Porter Drace a mile or a mile and a half from the North Canadian at eighteen minutes

before twelve, so they would have traveled the intervening nine miles in seven minutes, or something over a mile a minute. This witness, in addition to expenses, received fifty dollars. His testimony is not sufficient to overcome the testimony of Williamson, and the other witness, as to the time of leaving the sand bar. I therefore find that it is not made to appear that Ratts left the sand bar before twelve o'clock, noon, on the day of the opening.

Was the sand bar inside the Territory? This is a mixed question of law and fact. The evidence shows that Ratts and the main bulk of the crowd with him, crossed to the sand bar before noon, and if it was inside the Territory he would be disqualified. It was situated north of the then flowing current of the river, but nearer the south natural bank than the other. The evidence shows that the South Canadian river flows between high and well defined natural banks. That the bed is full of sand, and that the flowing current frequently shifts from side to side, within these banks, being sometimes on one side and sometimes on the other. In your office decision of June 5, 1893, following the rule laid down in the case of *Dunluth v. The County, etc.* (55 Iowa, 558), it was held that the center of the bed of the river, was the boundary line of Oklahoma, without reference to whether the channel or current of running water was on one side or the other. In passing upon the motion for review of that decision October 25, 1893, your office reached a different conclusion, following the rule as laid down in the case of *Iowa v. Illinois* (147 U. S., 1), and reversed the decision of June 5, 1893, holding that the same rule applied to non-navigable as to navigable streams. Reference to the cases cited (55 Iowa and 147 U. S.) will show that the court was careful in both cases to use the term "navigable stream." In the latter case, page 13, the supreme court say, referring to the cases of *Dunluth, etc. v. The County* (55 Iowa) and *Buttennuth v. St. Louis Bridge Co.* (123 Illinois:

The opinions in both of these cases, are able, and present in the strongest terms, the different views as to the line of jurisdiction between neighboring states, separated by a navigable stream; but we are of the opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other, is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the mid channel, and if there be several channels, to the middle of the principal one, or rather the one usually followed.

The frequent changes in the currents of the Mississippi seems to have been the chief reason for the contrary rule, but is finally subordinated to the higher consideration of the interests of commerce and navigation.

The reason of the rule does not apply to non-navigable streams nor in my opinion does the rule itself. I take it, therefore, that the southern boundary of the Territory of Oklahoma is the middle of the bed of the South Canadian river reckoned from its natural standing banks.

The sand bar from which Ratts started was, in my opinion, not inside the Territory and was a lawful point from which to start.

By reference to departmental decision of May 18, 1895, now under review, it will be seen that a different view of the testimony to that now taken led to a different conclusion from the one here reached, and that the questions of law involved are not discussed therein. Upon re-examination of the record I find that the view of the evidence presented in the decision on review, is not supported by the evidence itself, parts of which either escaped notice or were misinterpreted, and I now find that the evidence does not warrant the conclusion that Ratts was a "sooner," and said decision and finding is accordingly revoked.

Your office decision of October 25, 1893, is reversed and your office decision of June 5, 1893, in which the finding of the local officers is approved, is hereby approved.

PRACTICE—APPEAL—OKLAHOMA TOWN LOT.

PROUTY *v.* CONDIT.

Failure to appeal within the proper time, in proceedings arising before a townsite board, will not defeat the right of the appellant to be heard, where it appears that the appeal was filed within the time accorded therefor in the notice given of such right.

As against the claim of one living in open adverse possession of a town lot, another claimant, who has not openly asserted his claim, can not be heard to say that said adverse occupant was in fact the tenant of a third party.

Secretary Smith to the Commissioner of the General Land Office, January
(J. I. H.) 21, 1896. (E. M. R.)

This case involves lot 2, block 60, Guthrie, Oklahoma.

The record shows that on August 25, 1890, Frank G. Prouty filed his application with townsite board No. 1, for a deed to the above described lot, and that on August 26, 1890, Lottie Condit also filed her application for the same lot.

The case then came up for a hearing on December 9, 1890, and on December 22, 1890, a majority of the board rendered their decision in favor of Lottie Condit.

March 28, 1894, your office decision was rendered wherein you reversed the action of the majority of the board and awarded the lot to Frank G. Prouty.

On May 26, 1894, Lottie Condit appealed and on July 18, 1894, your office declined to forward the appeal on the ground that it was not filed in time.

Upon her application for writ of certiorari this Department, on December 6, 1894, ordered the record to be sent up. (19 L. D., 472.)

It is not necessary now to consider the question raised in the application for the writ of certiorari; that question becomes immaterial in view of what the record shows upon the question of service, it appear-

ing upon an examination of the evidence of service made in this case, that it was mailed to Lottie Condit on April 26, and that appeal was filed on May 26. The notice sent, improperly gave the parties twenty days for appeal, and allowing the usual ten days for return of notice, the time had not expired when the appeal was filed under the doctrine laid down in *Watt et al. v. Columbia Townsite* (18 L. D., 139), it being held therein (syllabus)—

As said instructions provided for an exception to the regular practice, failure to comply therewith will not defeat the right of appellant to be heard where it appears that his action was based upon the construction of said requirement adopted by the local office.

See also *Schmidt v. Stillwell* (1 L. D., 151) and *Vettel v. Norton* (*idem*, 459), where the general rule is laid down that action taken under the advice of the local office should be without prejudice, unless required by the absolute demands of the law. There seems to be no such necessity here.

The case of *Watt et al. v. Columbia Townsite*, it is well to note in this connection, was under the same rule, involving precisely the same facts as the case at bar, save only that the time there given for appeal was thirty days instead of the twenty herein mentioned.

The evidence in this case has been examined and much difficulty has arisen in arriving at a just determination of the questions of fact involved. There seems to be no dispute by either claimant, that the first settler upon the lot was a Doctor Keys, who arrived in the Territory before noon, of April 22, 1889. The question at issue is the priority of occupancy of lot No. 2, within the meaning of the law; that is, an adverse open claim to the lot as between Lottie Condit and Prouty. There is no question as to Prouty being on the lot prior to Lottie Condit. This is admitted, but the question to be decided is whether the occupancy of Prouty was such as was contemplated by the law in initiating a right which, if prosecuted, would end in securing a deed from the government to the lot.

Upon this question your office decision decided affirmatively; the majority of the board of townsite trustees who tried this case answered in the negative.

Upon the part of Lottie Condit, it appears that about the first day of May she commenced the erection of a foundation for a house upon the front or east part of lot No. 2, a portion of the foundation being upon the lot and a portion projecting into the street. The erection of this house was stopped by the authorities and during the night of the day upon which the erection was started, some of her lumber was stolen. The next day she entered into a lease with one W. S. Payne, by which she was permitted, in consideration of the sum of \$15 per month rent, and in consideration of the establishment of a house of two rooms upon said tract, to move upon the back portion of lot No. 2, and there erect her house, which she immediately did.

It appears further, though not very clearly, that W. S. Payne was claiming some lot that conflicted with Dr. Keys' lot, as to the back portion of lot No. 2.

It does not appear that Lottie Condit intended to release any rights that she had to lot 2, by the agreement she made with Payne, in fact the lines of the different lots, it appears, were not definitely fixed and she continued to assert her claim to lot No. 2, and as a matter of fact never paid Payne any rent, and during the whole of the period up to the date of hearing, as far as I am able to ascertain, she continued to reside upon lot No. 2, and never moved therefrom.

She erected a house, consisting of two rooms, at a cost of \$300. She also purchased the improvements of Little for \$100. Some evidence was introduced to show that she entered into an agreement with some men by which she was to build a house on the front of lot No. 2, and she was to divide the lot equally with these other parties, but there is not sufficient evidence to sustain this allegation.

Upon the other hand it appears that Prouty went upon this land for the first time in April 23; that he there found Dr. Keys in possession; that he remained on the lot until the arrival of his printing outfit, and that a large tent was placed upon the front portion of the lot, in which the printing outfit was put, and he maintained that his presence was that of an adverse claimant to the land; that he openly and notoriously made such statements; that he only agreed with Keys and Co. to get out issues of their weekly paper the "Get Up," and that he conducted a jobbing house there and was not an employe of the newspaper company, but that his only connection with them was as has just been set forth.

On the other hand, W. T. Little, who appears to be the witness in the best position to know the real facts, maintains that Prouty was an employe of the newspaper company; that he was paid a salary of \$14 per week for his services and the use of his printing outfit, and that he was there simply as an employe, and not as an adverse claimant, until after he left Guthrie on the 20th day of May.

It does not appear that Prouty ever told Lottie Condit prior to that time, or Little, that he was an adverse claimant to the land; it does appear that he did tell some people, but not those connected with the lot in any way, or who were laying any claim thereto. Prouty swears that when Lottie Condit's house was erected that he protested against it; that he had his Winchester rifle with him and that Deputy United States Marshal Payne drew a revolver on him; that there was considerable of a disturbance and loud talking and a large crowd of people.

In reply to this Payne swears that there was no disturbance, except that a man by the name of Crane, tried to push Lottie Condit's house off the lot, and that Dr. Keys was there protesting against its erection. Prouty was not present and made no protest whatsoever.

One of the witnesses states that on a prior trial of this case in a

court, for possession, Prouty made a similar statement but stated that he had with him a pistol instead of a Winchester rifle. The man who laid the foundation for Lottie Condit, who was a witness for Prouty, states that he did not see him there.

It seems to me improbable that Keys and Co., would have employed Prouty, or, taking Prouty's own statement, would have contracted with him for the publication of the weekly "Get Up," if, in fact, he was there as an adverse claimant to Doctor Keys, the father of the Keys interested in the newspaper.

It would seem to be more likely that the statement made by Little as to the facts in the case were true. It appears remarkable, if this adverse claim of Prouty was true, that none of the interested parties to the lot ever heard him make such statements until the last part of May.

Prouty sets forth that he had \$100 worth of lumber purchased for the sides of the tent in which his printing outfit was, but Little, on the contrary, states that the money was furnished by him and that all improvements upon the tract, aside from Dr. Keys' little tent and the erection of Lottie Condit's house, were paid for by him, through Prouty as his agent. Prouty subsequently undertook to make improvements upon the land and was prevented from doing so by the friends and supporters of Lottie Condit; however, the improvements sought to be placed upon the land by Prouty were subsequent in time to the erection of Lottie Condit's house, and can give him no claim that would be superior to hers.

Even though Lottie Condit was a tenant of W. S. Payne's on lot No. 2, it does not lie with Prouty to raise the question. That question would be considered as between Payne and Condit, her improvements having been made upon the tract, and she living there in open adverse possession all the time, when it appears that Prouty's claim to the land consisted only in statements made to persons who had no interest in the lot and who had no claim thereto.

I am, therefore, led to hold that the decision appealed from was in error, and that the deed should be given to Lottie Condit for the lot involved.

RAILROAD GRANT-INDEMNITY SELECTION—ORDER OF MAY 28, 1883.

NORTHERN PACIFIC R. R. Co. v. ANDERSON.

The departmental order of May 28, 1883, waiving the specification of losses, did not contemplate selections of lands subject to settlement at such time.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1896. (F. W. C.)

I have considered the appeal of the Northern Pacific R. R. Co., from your office decision of May 22, 1895, rejecting the attempted selection by the said company of the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, T. 132

N., R. 40 W., St. Cloud land district, Minnesota, and holding for allowance the homestead application presented by Truls Anderson covering same land.

The land here in controversy is within the indemnity limits of the grant for said company and was included in the withdrawal ordered by letter of December 26, 1871, received at the local office January 10, 1872.

The company applied to select this land by its lists presented August 3, 1883, December 29, 1883, and June 16, 1885, which lists were rejected for conflict with the pre-emption filing of one Alonzo Whitney, which was still of record although the same had been ordered canceled for abandonment in 1870. These lists were not accompanied by a designation of losses as a basis therefor.

The company appealed from the rejection of its several lists.

On April 4, 1884, Anderson applied to make entry of this land and appealed from the rejection of his application by the local officers.

Your office decision of February 15, 1892, sustained the action of the local officers and Anderson appealed to this Department. Said appeal was considered in departmental decision of October 17, 1893, not reported, in which it was held, under the authority of the decision in the cases of *Darland v. Northern Pacific R. R. Co.* (12 L. D., 195), and *Sawyer v. same company* (id., 195), that if the land was free from claim at the date of the indemnity withdrawal, such selections were protected by the departmental order of May 28, 1883.

In order to determine the status of the land at the date of the indemnity withdrawal, the case was remanded for hearing.

Upon the record made at said hearing the case is again before this Department.

It is now shown that from a date prior to the receipt of said order of withdrawal at the local office until 1879 or 1880, this land was in the possession of one Ole Johnson, a duly qualified homesteader.

In the case of the *Northern Pacific R. R. Co. v. Miller*, on review (11 L. D., 428), it was held:

The departmental order of May 28, 1883, did not contemplate the selection of lands subject to settlement without designating the bases therefor, but was applicable only to such lands as were protected by withdrawal. (syllabus.)

It is plain therefore, from the record now before me, that the company's selections covering the land in question were not protected by the order of May 28, 1883, not having been accompanied by a designation of losses as a basis for the selections, and the same were no bar to Anderson's application to make homestead entry of the land.

Your office decision is therefore affirmed.

TIMBER CULTURE ENTRY—EQUITABLE ACTION.

TIMPSON v. LONGNECKER.

A timber culture entry may be equitably confirmed where the entryman fails to submit final proof within the statutory period and the delay is satisfactorily explained.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (A. E.)

On November 5, 1880, Julia A. Longnecker made timber culture entry of the SW. $\frac{1}{4}$ Sec. 4, Tp. 3 N., R. 28 W., 6th P. M., McCook, Nebraska. On November 11, 1893, six days after the thirteen years expired, George Timpson filed a contest against the entry alleging that the defendant had failed to make the required proof within thirteen years from the date of entry. Affidavit having been filed to the effect that defendant was a non-resident, notice was given by publication, and the date of hearing set for January 24, 1894. On December 18, 1893, the defendant appeared, submitted final proof, tendered fees, and demanded receipt. The local office refused to accept the fees or issue certificate. From this defendant appealed.

On the date set for the hearing both parties appeared, the defendant objecting to the jurisdiction. On February 21, 1894, the local officers rendered a joint decision recommending the entry for cancellation, because the entry was not proved upon, nor final nor cash proof offered therein within thirteen years from date of entry.

From this defendant appealed, and, on October 11, 1894, your office decision, after a full statement of the case showing that defendant had fully complied with the law, says:

It further appears that defendant is seventy-seven years of age and lives in Kentucky; that she was taken sick in the winter of 1892-3, and was confined to her bed most of the time until about December 1, 1893; that she fully intended to go to Nebraska and prove up her timber culture entry in the spring or summer of 1893, but was unable to make such a long journey, on account of her sickness.

Passing to the decretal part of the decision, your office says:

There being no service of contest notice upon Julia A. Longnecker, and plaintiff having failed to amend his contest affidavit after his attention had been called to the misnomer by defendant's motion, and the defendant having shown good faith, being prevented by sickness from making her final proof, your action in refusing to dismiss said contest is reversed, and the contest hereby dismissed. In case this decision becomes final, the proof offered by Julia A. Longnecker will be submitted to the board of equitable adjudication for action thereon.

The full discussion of the facts in this case by your office decision of October 11, 1894, precludes the necessity of any discussion here.

Your office decree is correct, and the same affirmed.

RAILROAD LANDS—SETTLEMENT RIGHT.

NANCY B. WITTEN.

Lands contiguous to a homestead entry are not subject to purchase by the homesteader as a settler under the provisions of the forfeiture act of September 29, 1890, as he is not entitled to claim settlement at the same time under both the homestead law and said forfeiture act.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (P. J. C.)

It appears that Nancy B. Witten filed two applications to purchase under the act of September 29, 1890 (26 Stat., 496), the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 23, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 25, Tp. 2 S., R. 12 E., The Dalles, Oregon, land district, December 1, 1893. Her applications were allowed, the purchase price paid, and receiver's receipts issued.

In the course of business in your office the matter was considered, and by letter of September 28, 1894, the local office was informed that,

As the party claims settlement, and as the tracts in said entries are not contiguous, the entrywoman will be given thirty days from receipt of notice within which to show cause why one entry should not be canceled.

She was also required to remedy some formal defects in her applications, and supply some additional proof, which, however, are not material to the issue here. These latter requirements seem to have been met, but no reason was shown why one of her entries should not be canceled. On the contrary, it is shown by her affidavit that the tracts she is seeking to purchase are contiguous to her homestead entry, made January 24, 1889. Your office therefore, by letter of December 10, 1894, decided:

As she can not claim settlement under both the homestead act and the act of September 29, 1890, and as she does not furnish evidence of license or deed from the railroad company executed prior to January 1, 1888, her entries are hereby held for cancellation.

From this judgment the applicant appealed.

There can be no doubt but that these entries were erroneously allowed, for the reasons stated in your said office letter and quoted above.

Your office judgment is therefore affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

STUART *v.* SOUTHERN PACIFIC R. R. Co.

An applicant for land within railroad indemnity limits whose application is wrongfully rejected, and who fails to appeal from such action, but remains in the possession and occupancy of the land, is protected thereby as against a selection on behalf of the company made after the acquisition of the applicant's settlement right.

The case of Northern Pacific R. R. Co. et al. *v.* Lillethun, 21 L. D., 487, cited and followed.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. F. W. C.

I have considered the case of Archibald B. Stuart *v.* Southern Pacific R. R. Co., involving the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 15, T. 5 S., R. 5 W., S. B. M., Los Angeles land district, California, the record in which was forwarded with your office letter of June 18, 1895.

This tract is within the indemnity limits of the grant made to aid in the construction of the branch line of the Southern Pacific Railroad, and was included within the company's list of selections filed May 2, 1885. Said list of selections was not accompanied by a designation of losses as required by the circular approved November 7, 1879, and the same were not supplied until October 14, 1887.

It appears that during the year 1889 Stuart tendered at the local office his application to file pre-emption declaratory statement for this land in which statement he alleged settlement upon the land in 1883. Said application was forwarded to your office for instructions by the local officers and was returned by your office letter of September 2, 1889, with directions to order a hearing in the premises if the showing warranted it. It appears, however, upon consideration of the matter the local officers denied Stuart's right to a hearing upon the showing made, and rejected his application to file pre-emption declaratory statement, from which action he failed to appeal, and report was made of this fact by letter from the local officers dated November 7, 1889.

The company's list of selections was thereafter examined by your office and duly approved by this Department, and patent issued covering the land in question November 5, 1892.

It appears, however, that on November 25, 1890, Stuart tendered a homestead application for the land in question whereupon the local officers ordered a hearing for the purpose of ascertaining the status of the land at the date of its selection by the company. Hearing was duly held and upon the testimony adduced the local officers found that Stuart had occupied the land since 1883; that it was not clear whether he went upon the land as a settler on public lands, a prospector for coal, or an intending purchaser from the company, and that whatever rights he may have acquired by reason of his settlement could not be considered upon his homestead application for the reason that the com-

pany's plea of *res judicata* was well taken, and they therefore recommended that his homestead application be rejected.

Stuart appealed to your office, and said appeal was pending, unacted upon, at the time of the approval and patenting of this land to the company, the same being presumably overlooked.

In your office decision of March 16, 1895, you considered the testimony offered in support of Stuart's application, with a view of determining whether such a showing had been made as would warrant proceedings looking to the recovery of this land under the provisions of the act of March 3, 1887 (24 Stat., 556).

You first hold that the matter is not *res judicata* and that Stuart is fully protected in his rights, whatever they may be, under his homestead application.

In considering the testimony offered at the hearing you found that Stuart is a duly qualified homestead claimant; that he settled upon this land in September, 1883; that his residence thereon was continuous to the date of hearing. You further found that he had made improvements on the land valued at about \$600, and that he settled and claimed the land with the intention of making it his home and acquiring title under the public land laws. You further hold that his claim under the settlement laws is superior to that of the company under its grant, and in advising the company's attorney of the action taken you state that the notice "is equivalent to laying a rule on the company to show cause why the title to said tract should not be reconveyed to the United States as contemplated by the act of March 3, 1887."

In response to said notice, an answer has been filed by the company in which it sets up the plea that to assume that Stuart settled, as alleged, in 1883, with intention to acquire title under the public land laws, that such settlement could avail him nothing as against the grant for the reason that the same was included within the legislative withdrawal authorized by its grant, upon the filing of the map of general route, and also the executive withdrawal of indemnity lands made by your office. In support of its contention it is urged that said withdrawals are duly respected and recognized by the supreme court in the case of *Wood v. Beach* (156 U. S., 548), to which reference is made.

The full contention of the company was considered in departmental decision of December 12, 1895, in the case of the Northern Pacific Railroad Company *et al. v. Lillethun* (21 L. D., 487), wherein it was held:

The withdrawal on general route contemplated by section 6, act of July 2, 1864, extends only to lands within the primary limits of the grant.

A withdrawal of land for indemnity purposes in violation of the provisions of the grant, for the benefit of which the withdrawal is made, confers no right upon the grantee, and is no bar to the acquisition of settlement rights.

An application to enter, pending an appeal, precludes the allowance of an indemnity selection for the land covered thereby.

An examination of the testimony offered at the hearing shows that Stuart in the winter of 1883 and 1884, applied to the local office to enter

this land and his application was denied on account of the railroad grant. He does not appear to have appealed therefrom, but afterward sought to obtain title from the company.

It appears that he built a brush house upon the land and thereafter, with the aid of one Mooer, built a board house upon the land. Mooer furnished the lumber for this building and it appears that men in Mooer's employ occupied the land during the year 1885. Stuart was prospecting for coal and appears to have been working in the interest of Mooer; but whether the prospecting was upon the land in question, or the adjoining land, the record does not make clear. Mooer applied to purchase this land, together with other land, of the railroad company, and the company contracted to sell the same to him.

Stuart, however, seems to have continued residing upon the land in question and improving the same, and applying the principle announced by the supreme court in the case of *Ard v. Brandon* (156 U. S., 537), wherein it was held under an application to enter land within the indemnity limits of the Missouri, Kansas and Texas grant, wrongfully rejected, and from which no appeal was taken, but where the party remained in possession and cultivated the lands, that his right under his settlement claim, as against an action brought to recover possession from him by a party claiming through the grant, was not affected by the fact that he took no appeal, it would seem that Stuart was fully protected in his possession and occupancy of this land as against the company and its transferees.

In view of the fact that the company has been heard under the rule issued by your office to show cause I have to direct that demand be made of the company under the provisions of the act of March 3, 1887, for the reconveyance of this land to the United States, and at the expiration of the time allowed under the statute that you make report of the action taken to the end that such future action may be taken by this Department as the facts then presented by the record may warrant.

FINAL PROOF PROCEEDINGS—PROTEST—CONTEST.

BRADLEY v. WAIT.

A protestant against final proof who sets up his own right to enter the land is bound to present at such time all objections against the proposed entry then known to him.

A clerical omission occurring in an original homestead affidavit does not furnish proper ground for a contest.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (C. J. W.)

March 4, 1884, Thomas H. Bradley filed declaratory statement No. 8333, for E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, T. 30 N., R. 6 W., Seattle, Washington.

July 14, 1886, Francis M. Wait made homestead entry No. 8274 for the same land.

July 12, 1889, Wait offered final proof against the acceptance of which Bradley protested.

The local officers decided adversely to protestant and he appealed to the Commissioner who sustained the decision of the local officers.

Bradley appealed from this decision, and on July 20, 1894, the matter was passed upon here (19 L. D., 82), and your office decision adverse to Bradley was affirmed.

On March 2, 1895, final certificate No. 5038 was issued to Wait.

May 19, 1893, Bradley, pending his protest, made application to contest the homestead entry of Wait.

On February 16, 1895, the case under Bradley's protest proceedings was closed and Wait allowed sixty days to complete his entry by making the necessary payment, which was done before final certificate issued March 2, 1895.

On April 12, 1893, the local office, by request of Bradley it seems, transmitted to your office a number of papers filed by Bradley, and amongst them, what purported to be a contest. The grounds of contest stated therein are:

1. That Wait in his original homestead affidavit did not show his qualification to make a homestead entry, as he omitted therefrom the words "I am," his affidavit reading "do solemnly swear that . . . a native born citizen of the United States etc.
2. That the applicant to contest is entitled, by his settlement and application for a homestead entry, filed with his papers, to the land in question.
3. That Wait has made various agreements to dispose of the land.
4. It is sought to be shown by exhibits that *ex parte* testimony was taken of which he had no notice and this entry on final receipt—"test'y fee of \$1.60 paid for 710 words at 22½ cts. per 100" is cited as evidence.

On June 11, 1895, passing upon these grounds of contest your office held them insufficient and directed their dismissal. From this action of your office, Bradley appealed, and the same is now before me. Two questions are presented:

1. Could Bradley be heard at all as a contestant, except for cause arising since his protest?
2. If he is in an attitude to contest, does he state meritorious grounds?

He appears first as a protestant against the final proof of Wait in which he insists upon his prior and superior right to the land over Wait. He was essentially a contestant and bound at that time to present all objections to Wait's entry, then known to him, upon which he expected to rely. He claimed the right to make entry in preference to Wait, and put his own right in issue, notwithstanding he sought to reach his end through the construction of a section of the Revised Statutes.

One who attacks an entry cannot split up his causes of complaint into fractions and bring a number of suits seriatim, where one would

answer all purposes. But if he were not estopped by the former litigation I am unable to find anything which could avail him in his present grounds of complaint.

The objection to Wait's original homestead affidavit seems to me to be without weight or merit. The omission of the words "I am," was clearly a mere clerical error, cured by a subsequent affidavit swearing to his citizenship, but there is no allegation that he was not a citizen.

The second proposition, that he, Bradley, is entitled by his prior settlement to the land, is a mere assertion, contradicted by the result of the litigation growing out of his protest.

The third proposition, that Wait has made various agreements to dispose of the land, presents no meritorious or well defined issue, and the brief and exhibits filed in support of it do not make a case which indicates that a hearing is necessary.

The last charge, that *ex parte* evidence had been taken of which he had no notice, without stating what evidence and where taken, presents no actionable cause of complaint. The reason offered to support this general charge, quoted from the record, furnishes the evidence which demonstrates its want of merit. I must therefore approve your office decision.

HOMESTEAD ENTRY—SETTLEMENT RIGHT.

COURVEL *v.* SAVOIE.

The right of a homesteader to perfect his entry is not defeated by the prior occupancy of a portion of the land by one who is not at such time asserting any claim thereto under the settlement laws.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (F. W. C.)

I have considered the appeal by Augustine Courvel from your office decision of April 24, 1895, rejecting his homestead application covering the NW. $\frac{1}{4}$ of Sec. 13, T. 8 S., R. 3 E., New Orleans land district, Louisiana, and holding for reinstatement the homestead entry made by Oscar Savoie covering the same land.

This tract is within the indemnity limits of the grant for the New Orleans Pacific Railroad Company, and on December 10, 1885, Oscar Savoie applied to enter the same under the homestead laws alleging settlement thereon in February, 1879.

On December 1, 1886, P. M. Montousse was permitted by the local officers to make homestead entry of this land, notwithstanding the pending application by Savoie. Said entry was afterwards canceled, and although he was a party to the subsequent proceedings had in relation to this land, yet, as he failed to appeal from the decision of the local officers adverse to him, which decision was sustained by your office, he

is no longer a party to the case and it is unnecessary to recite the subsequent action taken in the matter of his claimed rights under his settlement made upon this land.

By your office letter of March 16, 1887, the application of Savoie was considered and a hearing was ordered the railroad company being made a party, which hearing resulted in departmental decision of March 25, 1889, in which it was held under the authority of the decision of this Department in the case of Simon Leger (7 L. D., 487), that the withdrawal made for indemnity purposes on account of this grant, was in violation of law and void, and as no selection had been made of the land prior to the settlement and tender of application by Savoie, the land was open to Savoie's settlement and entry and the company's claim thereto was rejected.

The company filed a motion for the review of this decision, but subsequently filed a relinquishment in favor of Savoie, and on October 15, 1892, the motion was dismissed.

It now appears that during these proceedings arising from Savoie's application presented in 1885, to wit, on April 28, 1887, the receiver forwarded an application by Augustine Courvel to enter this land under the homestead laws, in which he alleges settlement upon the land in January, 1870.

By your office letter of October 28, 1892, a hearing was ordered between Savoie and Courvel in order to determine their respective rights under their separate applications. After this order for a hearing, and before the same had been had, the local officers permitted Savoie to make homestead entry of the land. This entry was ordered canceled by your office letter of August 4, 1893, as being improperly allowed after the order for a hearing, and Savoie appealed to this Department. Said appeal was considered in departmental decision of October 9, 1894, in which it was held:

As the entry papers by Savoie do not appear to have been formally canceled upon the record, and the hearing has been had, as before referred to, I have to direct that Savoie's entry be permitted to stand subject to the decision upon the record made at the hearing had between the parties, which you will consider at your earliest convenience.

Said record was considered in your office decision of April 4, 1895, from which Courvel has appealed, and in said decision you find that Courvel in the year 1870 purchased a tract of land from one Wm. Smith, adjoining that in question. After Courvel had been living upon the land purchased for several years a private survey was made of the tract adjoining which survey disclosed that the house in which he lived, and some of his other improvements were upon the land here in question. The value of these improvements is placed at about \$125.

Savoie did not settle upon the land until long after Courvel's purchase, but it is clearly shown that Courvel did not lay claim to any portion of the land in question under the settlement laws, and although he was well aware of the claim set up by Savoie, he made no attempt

to assert a claim under the settlement laws until 1887, more than two years after Savoie had filed his homestead application.

In view of departmental decision of March 25, 1889, before referred to, it must be held that this land was properly subject to Savoie's entry and application when presented in 1885, and no such claim had been shown by Courvel as would defeat Savoie's rights thereunder. His entry of the land will therefore be permitted to stand and the application by Courvel will stand rejected.

Your office decision is affirmed.

PRACTICE—NOTICE OF APPEAL—RULE 48 OF PRACTICE.

BUTLER *v.* ROBINSON.

A notice of appeal, from a decision of the local office, left in the office and upon the desk of the appellee's attorney, may be regarded as sufficient, if the fact that such notice was actually received by said attorney is apparent from the record. The finding of facts by the local office should not be held final under rule 48 of practice if based on matters not properly at issue under the law.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (J. L. McC.)

James M. Robinson has applied for an order directing your office to certify to the Department the record in the matter of his timber-culture entry for lots 1, 2, 3, 4, 5, and 6, of Sec. 8, T. 16 S., R. 1 W., Los Angeles land district, California, against which contest has been filed by one William J. Butler.

On January 15, 1894, the local officers rendered decision recommending the cancellation of the entry.

Notice of said decision was given the defendant by registered letter on January 26, 1894; hence his time for appeal expired on March 7, 1894.

On March 1, 1894 (within the time prescribed, as above), the defendant filed notice of appeal, as follows:

J. M. Robinson hereby gives notice that he does not waive his rights of appeal from decision or recommendation of register and receiver of January 14, 1894, by reason of this application for review and further taking of testimony; and does appeal on all the statutory grounds allowed for appeal in such cases; that it was gross error to find that five acres were not plowed the second year, and that the first five acres were not cultivated the second year, and criminal error to find as to any fact outside of these two years covered by the affidavit of contest. . . . Filed in the event of adverse decision, on motion in good faith and not for delay, this 28th day of February, 1892.

On the same day he filed a motion for review. Both motions were accompanied by evidence of service upon S. S. Knoles, attorney for contestant, on February 28, 1894. Whether such service was legal service is one of the pivotal questions in the case, which will be discussed hereafter.

On March 6, 1894, Robinson filed a motion for a rehearing. The motions of March 1, for review, and of March 6, for rehearing, were denied by the local officers on March 10.

On April 23, 1894, Robinson filed a paper which he endorsed, "Second application for rehearing, and appeal from denial dated March 10, 1894, and appeal from second denial, and appeal from recommendation of January 15, 1894."

On April 24, 1894, the contestant Butler, by his attorney, filed a motion that the record be forwarded by the local officers to your office, for the reason that their decision of January 15, 1894, had become final, no appeal therefrom having been filed. The motion was accompanied by said Knoles's affidavit, that no notice of appeal, review, rehearing, or of any kind, had been "served" on him.

The local officers, whether by oversight or for some other reason not made clear by the record, had failed to transmit to your office defendant's appeal filed March 1, 1894 (*supra*); and on March 5, 1895, your office, finding no appeal in the record before it, held the finding of the local officers as to facts to be final (under Rule 48 of Practice), canceled Robinson's entry, and closed the case.

On March 18, 1895, defendant filed a motion for review of your office decision of March 5, 1895—as yet supposing that his appeal was in your office.

Defendant's appeal, filed in the local office on March 1, 1894 (*supra*), was received by your office on May 2, 1895.

Up to the last named date, defendant Robinson had acted as his own attorney. He now employed an attorney in Washington, who, on May 11, 1895, filed an appeal from your office to the Department.

On June 12, 1895, your office, considering the entire record before it, as above set forth, found that the defendant's appeal from the action of the local officers had never been properly served, refused therefore to disturb its decision of March 5, 1895, and declined to transmit to the Department the appeal filed May 11, 1895.

Thereupon an application for certiorari is filed, contending that your office erred:

1. In holding that an appeal from the register and receiver's decision of January 15, 1895, was necessary.
2. In holding that defendant's notice of appeal from that decision was defectively served.

The material portions of the register and receiver's decision were as follows:

The drift of the testimony, and the preponderance of it also, will be found, we think, to be in favor of the contestant. The plowing appears to have been mainly done by a Chinaman, whose team consisted of one horse. It is easy to credit the testimony of the witnesses for the contestant that it was very bad work; that the ground was nowhere well broken, and did not show any thorough cultivation. We think, too, that the evidence is against the defendant as to the acreage required to be cultivated. In the matter of the grain crop the dispute is sharp, but the testi-

mony of the surveyor and at least one other witness, presumably disinterested, favors contestant. As to the matter of planting trees, those alive and growing are declared to have been planted by a former occupant of the land, and not by Robinson.

We feel compelled to conclude that the claim has been neglected to such an extent as to show lack of the good faith required in these cases, and that neither in spirit nor letter have the requirements of law been complied with; and we therefore recommend that the contest be sustained.

Your office has treated the decision of the local officers as conclusive on the facts; but the petitioner contends that he is entitled to the judgment of your office on the evidence—even if there were no appeal—for the reason set forth in clause No. 1 of Rule 48 of Practice, inasmuch as “gross irregularity is suggested on the face of the papers.” The charges were that the defendant (1) did not break or plow five acres of said land during the first year; (2) that he did not break or plow an additional five acres during the second year; (3) that he did not cultivate said first five acres to crop or otherwise during the second year; (4) that he has not complied with any specific requirement of the timber-culture act. The petitioner contends that the *allegata* and the *probata* do not correspond, as should be the case according to numerous departmental decisions—citing *Platt v. Vachon* (7 L. D., 408); *Jenks v. Hartwell* (13 L. D., 337); *Prince v. Wadsworth* (5 L. D., 299); *Andrews v. Corey* (7 L. D., 89); and adds:

The only facts that can be said to be found in the register and receiver's decision are: (1) That the plowing was mainly done by a Chinaman, whose team consisted of one horse; (2) That the land had been neglected and the requirements of the law have not been complied with, so that bad faith may be inferred.

So far as the finding relates to the Chinaman, it is obviously immaterial. No reason appears why a Chinaman could not plow as well as anybody else; and the Department will certainly not take judicial notice of the deficiencies of Chinamen in general, or of this one in particular. Nor does it appear, directly or inferentially, that one horse was not sufficient for the plowing; and the decision does not even purport to express an opinion to that effect.

The charge of bad faith was not made in the contest affidavit; and any evidence on that point, if offered, was irrelevant and inadmissible. Proof of bad faith will not support an allegation of failure to plant and cultivate (*Alexander v. Hamlin*, 17 L. D., 452). The only charge is failure to do certain specific work; and the register and receiver utterly ignore the evidence as to that work. . . . It was error to hold that any appeal from the register and receiver's decision was necessary; and the decision below is erroneous in closing the case against the defendant on that ground.

The second question in issue is, whether the defendant's appeal from the local officers was properly served upon counsel for the contestant.

The defendant makes affidavit that he served said appeal by leaving a copy thereof in the office and on the desk of S. S. Knoles, attorney for the contestant, on February 28, 1894. This affidavit is corroborated by A. F. Merchant, who states that on or about February 28, 1894, he saw the defendant place some papers on Mr. Knoles's desk. Knoles, in his affidavit executed April 23, 1894, states that, up to that date, no notice of any kind had been *served* on him or any one in his behalf; but

it is suggested that he may have received and read the letter left upon his desk by defendant, without considering it to have been "served" on him. That his statements in this connection are not entirely reliable is shown by the fact that in his affidavit executed April 23, 1894, he asserts that no notice of *any kind* had been served on him by the defendant or any one in his behalf, while in his letter transmitting said affidavit he admits that a copy of defendant's second application for a rehearing had been served upon him on April 20, 1894. The defendant, in his affidavit executed April 26, 1895, declares "that the said S. S. Knoles has, since said day" (February 28, 1894), "admitted that he had received the copies of said papers left by affiant in the office of said Knoles as aforesaid." Knoles, in his motion to dismiss the petition for certiorari, filed December 31, 1895, does not deny having actually received said papers; with manifest careful avoidance of any direct contradiction of defendant's statement, he says: "We do know we were not served with notice of appeal from the decision of the local office of January 15, 1894."

Finding as a fact, therefore, that a notice of said decision was laid upon the table in the office of counsel for contestant, and was, as might naturally be presumed, and as has since been acknowledged by him, in fact actually received, there remains the question whether under the circumstances set forth he was legally served with notice of said decision?

It does not appear to me that the provisions of the Code of California or of any other State or Territory can properly be recognized by this Department as controlling, where the departmental Rules of Practice have made explicit provisions.

The law and the departmental Rules of Practice are especially careful with regard to service of notice whereby jurisdiction is acquired; and the Department has repeatedly held that notice which is not sufficient to confer jurisdiction, may be sufficient for other purposes. See *Anderson v. Rey* (12 L. D., 620-1):

Notice of certain interlocutory motions, proceedings, orders, and decisions, may be made either personally or by registered letter through the mail; but the rules make no provision for the service of a notice of contest by registered letter.

(See also *Driscoll v. Johnson*, 11 L. D., 604, and cases therein cited.)

I am strongly impressed with the conviction that the contestant actually received a copy of defendant's appeal, and in my opinion it was sufficient notice of the same.

The decision of your office makes no finding of facts, but accepts the finding of the local officers, and in view thereof affirms their decision. Yet nothing can be clearer than that their decision is based largely, if not wholly, upon statements which would not warrant nor justify their conclusion. They say: "In the matter of the grain-crop the dispute is sharp;" but it is utterly unimportant whether or not the defendant raised any grain-crop; the requirement of the law is that the entryman

shall "cultivate to crop, or *otherwise*"—the purpose being, not to raise a crop, but to put the land in a condition for tree-raising. They say further: "As to the matter of planting trees, those alive and growing are declared to have been planted by a former occupant of the land and not by Robinson." But the contest affidavit covered—and inasmuch as the third year of the entry had not expired, it could cover—only the first two years of the entry; and the law does not require the entryman to do any planting during either of those years. In short, it is plain upon the face of their decision that the local officers, in densest ignorance of the demands of the timber-culture law, found bad faith on the part of the defendant, and recommended the cancellation of his entry, for not having done what the law does not require him to do.

Under such circumstances, the contingency having arisen which is contemplated in the first clause of Rule 48 of Practice—gross irregularity being suggested on the face of the papers—the decision of the local officers ought not to have been considered final as to the facts, even if the defendant had not appealed.

In my opinion, justice to the applicant demands that the record of this case should be certified to the Department, and I so direct.

CONTESTANT—PREFERRED RIGHT OF ENTRY—RELINQUISHMENT.

O'CONNOR ET AL. *v.* WILLARD'S HEIRS.

A contestant is not entitled to the benefit of a relinquishment filed during the pendency of charges of such character, and so presented, that it must be held the relinquishment was not the result of the contest.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (G. B. G.)

I have considered the case of Patrick O'Connor *et al.* *v.* the heirs of W. P. Willard on appeal of plaintiffs from your office decision of June 1, 1895, directing the issue of final papers on desert land entry, No. 39, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 34, Tp. 27 S., R. 25 E., Visalia land district, California.

This entry was made on April 2, 1877, by W. P. Willard. It is one of the desert land entries in the Visalia, California land district, that was suspended from September 28, 1877, until February 10, 1891.

On May 6, 1892, Patrick O'Connor, *et al.* filed affidavit of contest against said entry alleging:

1st. That the said land was not at the date of said entry and never had been desert land.

2nd. That said entry was not made for the use and benefit of said claimants but for the use and benefit of some other person, to this contestant unknown.

3rd. That said entryman has never reclaimed said tract of land or any part thereof, by conducting water thereon.

This contest was rejected by the local officers, your office affirmed that action and on appeal to the Department it was here held on April 16, 1894, that the second charge in the affidavit of contest "is altogether too indefinite to base a contest on," and "the third charge, that of non-reclamation is premature."

It was further held however that the first charge in the affidavit of contest is sufficiently specific and the case was remanded with directions that a hearing be ordered before the local office "to determine the character of the land at date of entry."

On March 16, 1893, George A. Willard, as administrator of W. P. Willard deceased, offered final proof on said desert land entry, except as to the NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ section 34, Tp. 27, S., R. 25 E. which he that day relinquished. Said entry was canceled as to the part relinquished and on the same day March 16, 1893, State indemnity school selection was presented therefor, which selection was filed and held suspended pending the final disposition of the aforesaid contest then pending.

Patrick O'Connor *et al.* protested against the acceptance of said final proof and having offered to pay all cost of the proceedings, were allowed to cross-examine the witnesses who had testified on the final proof.

On May 3, 1893, the local officers rejected the said proof and on May 31, following appeal was made to your office. At the time the aforesaid departmental decision herein was rendered the final proof of claimants had not been passed on by your office, and the Department for this reason declined to pass on that in advance of an expression of opinion thereon by your office.

On May 17, 1894, your office remanded the case to the local officers and by letter of that date ordered a hearing in accordance with the said departmental decision of April 16, 1894.

Before the day finally set for a hearing the contestant Patrick O'Connor, filed a petition and affidavit, in the nature of an amendment to the original contest, setting forth that the land had never been reclaimed by claimant, nor the heirs of said claimant, and further alleging that claimant nor his heirs have any water right with which to reclaim said land, and alleging that the final proof submitted as to the reclamation of said entry is null and void.

On December 27, 1894, the local officers rendered their joint decision wherein it is stated,

We have examined the record and proceedings in this case, and find no evidence introduced in support of the charges as to the non-desert character of the land, nor as to the fraud in the entry and we hold that the insufficiency of the proof of reclamation is not within the jurisdiction of this office as the matter of the proof of the reclamation is now pending before the Hon. Commissioner on appeal from the rejection by this office.

O'Connor *et al.* appealed and on June 1, 1895, your office considered together the appeal of the contestants and the final proof submitted

by the heirs of the entryman, affirming the local officers, and holding the final proof sufficient.

This decision was the subject of review by your office opinion of October 21, 1895, wherein the same general conclusion was reached.

The present appeal assigns ten specifications of error.

Briefly the contention of appellants is that your office erred in approving the decision of the register and receiver, that it was not within the jurisdiction of that office to hear and determine the charge of non-reclamation; that it was error to refuse to award to the contestants a preference right to enter the land relinquished by the desert land claimants in the face of their contest, and that it was error to accept claimant's final proof as sufficient.

It will be remembered that under the decision of the Department the case was remanded for a hearing on one issue alone—the character of the land at date of entry. This charge appears to have been practically abandoned, no evidence having been offered in support thereof. Indeed a charge that land was not desert land at date of entry is under strict rules of pleading inconsistent with the charge that it has not been reclaimed, and can only be justified on the ground that the government is a party in interest and will entertain charges that a statute has been violated in more than one of its requirements, however inconsistent such charges may be. The charge of non-reclamation when first made was premature, and although the contestants may have had the right to amend their affidavit of contest after the case was remanded, it does not appear how their interests would be thereby advanced. The insistence is that they are entitled to a preference right to the land relinquished while their contest was pending. This is based on the rule that a relinquishment made while a contest is pending against the entry, will be presumed to have been the result of the contest, and the contestants doubtless recognizing the weakness of their charge as to the non-desert character of the land saw the necessity of keeping alive the charge of non-reclamation, which was in the first instance prematurely made.

Briefly stated the question presented resolves itself into this—Does any preference right to enter lands relinquished while a contest is pending, lie when it appears that the charges were either false or premature.

This branch of the case might be eliminated on the ground that all questions relating to preference rights should be reserved until there has been an attempt to exercise such right, but the contestants ask for an adjudication now and a present settlement will relieve your office of future embarrassment in disposing of the land.

A contestant is entitled to a preference right to enter land relinquished after the initiation of his contest against the entry thereof, if the relinquishment is the result of his contest.

It does not appear in this case that the land relinquished had been reclaimed, but at the time the charge of non-reclamation was made it

was premature and did not lie, hence from a legal standpoint there was no contest pending on this ground.

The charge that the land was not desert land does not appear to have been supported by evidence.

I must therefore hold that the relinquishment filed herein was not the result of plaintiff's contest and that no preference right was gained thereby.

As to that part of the entry on which claimants have offered final proof I have examined the proof submitted and agree with your office decision that said proof is sufficient.

Appellant's protest is therefore dismissed and the decision appealed from is affirmed.

TIMBER CULTURE ENTRY—FINAL PROOF.

EDGAR M. JESSUP.

In the submission of final timber culture proof the personal testimony of the entryman should be taken before some officer authorized to administer oaths in the district in which the land is situated.

Secretary Smith to the Commissioner of the General Land Office, January 25, 1896. (W. A. E.)

Edgar M. Jessup made timber culture entry on July 29, 1885, for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, T. 119 N., R. 67 W., Huron, South Dakota, land district.

March 12, 1894, he filed petition asking that in the making of final proof on said entry he be permitted to give his own testimony before the clerk of the superior court at Los Angeles, California, where he now resides.

This petition was denied by your office on July 24, 1894, and from said decision Jessup has appealed.

He alleges in said petition, which is sworn to, that he has complied with the timber culture law for the required period, and now desires to offer his final proof; that his witnesses reside in the vicinity of said tract and can testify before the clerk of the court of the county in which the land is situated, but that he himself is now a resident of Los Angeles, California; that his claim contains only forty acres, and is worth about \$200; that he has been put to expense already upon the same, and if he is compelled to go to South Dakota to have his testimony taken there, it will cost more than the claim is worth.

Section 24 of a circular issued June 27, 1887 (6 L. D., 280), in regard to timber culture claims, reads as follows:

In making final proof the claimant (or, if he be dead, his heirs or legal representatives,) must appear in person with at least two witnesses at the land office of the district in which the land is situated, and there make the necessary proofs; or the affidavit of the party may be made, and his testimony, and the testimony of his

witnesses, given before a judge or clerk of a court of record in such land district, but all the proof must be taken at the same time and place and before the same officer.

In January, 1895, your office transmitted to the Department the draft of a proposed circular modifying the above section so as to permit the claimant himself (or, if he be dead, his heirs or legal representatives,) to give his testimony on final proof before the clerk of *any* court of record, the rule remaining unchanged as to the witnesses, who would still be required to give their testimony in the district in which the land is situated.

This draft was returned to your office on January 22, 1895, unapproved. In returning it the following language was used:

From a careful consideration of the matter I am unable to give my approval to the proposed change.

The uniform construction of this Department has always been to restrict the making of the affidavit in connection with the entry, or final proof thereon, to be made before officers authorized to administer oaths in the district in which the land is situated. While the timber culture law makes no specific requirement of proof on the part of the claimant, yet any affidavit or other form of proof, made in support of the timber culture entry, should be made before some officer authorized to administer oaths in the district in which the land is situated.

To require claimants to make their proof before some officer authorized to administer oaths within the land district in which the land is situated, may impose a hardship, and in some cases the claimant may not be able to comply therewith, yet such special cases may better be made the subject of confirmation by the board than to change the rule and permit the proof of the claimant to be made otherwise than before some officer within the land district.

Jessup's petition must therefore be denied.

Your office decision is affirmed.

SWAMP LAND GRANT—AGENT'S REPORT.

OREGON CENTRAL R. R. CO. *v.* STATE OF OREGON.

Concurrent reports of the State and government agents as to the swampy character of specific tracts at the date of the grant, based upon an investigation made by said agents in 1885, will not warrant favorable action by the Department in the absence of evidence furnished by the State as to the character of each subdivision.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 3, 1896. (J. L.)

On June 7, 1894, the Oregon Central Railroad Company filed an appeal from your office decision of February 19, 1894, wherein your office awarded to the State of Oregon as swamp and overflowed lands made unfit thereby for cultivation, the following tracts of land in Oregon City land district, Oregon, and held for rejection the company's claim to the same, to wit: [description omitted] aggregating 557.72 acres.

By the same decision your office directed the local officers to order a hearing to determine the character (as swamp or non-swamp) of lot 6 of Sec. 32, T. 3 N., R. 1 W., containing 24.10 acres.

It appears that by letter dated January 29, 1894, Sylvester Pennoyer, governor of Oregon, requested your office

"to cause such steps to be taken as shall allow the State of Oregon an opportunity to prove in such manner as you may approve that the following described lands are swamp and overflowed, to wit:

Lot 2	of Sec. 7, T. 3 N., R. 1 W., of the Willimette Meridian.
Lot 1	" 16, " " " "
Lot 4	" 15, " " " "
Lot 6	" 22, " " " "
Lot 7	" 21, T. 4 N., R. 1 W., " "
SW. $\frac{1}{4}$ NE. $\frac{1}{4}$	" 21, " " " "

On February 19, 1894, your office, in response to said letter, directed a hearing to determine the character of said lot 6 of section 32, T. 3 N., R. 1 W.; for the reason, that

Agent Shackelford of this office, and the agent on the part of the State, who examined the land in 1885, reported the same to be swamp and overflowed land within the meaning of the grant; and John S. Roe an agent of this office, who made a subsequent examination, classed said lot as dry land.

Your office then proceeded to award to the State of Oregon "as swamp and overflowed lands within the meaning of the act of September 28, 1850, as extended to the State of Oregon by the act of March 12, 1860 (12 Stat., 3)," all of the twenty-two subdivisions of land described in the list first above copied, and held the railroad company's selection of and claim to said twenty-two subdivisions for rejection; for the reason "that they had been found to be swamp lands by the agents of the government, who made special examinations thereof in the field."

It appears that the twenty-three subdivisions aforesaid, were embraced in a long list of swamp-land selections filed in behalf of the State of Oregon in the year 1871. On March 15, 1872, the United States surveyor-general for Oregon, after hearing elaborate arguments for the State's claims, certified in respect to the tracts of land involved in this case, as follows:

In the selections made by the State *north of the base line*, I find numerous small lakes listed that were meandered by the government surveyors, and consequently are not within the surveys, and cannot properly be listed with a view to patenting. (See page 17, of report.)

The fact that the lakes were meandered would indicate that the ridges lying outside the meanders, and which were surveyed, were dry, or at least not swamp lands at the time of the surveys.

The first official maps of townships 3 and 4 north of range 1 west, (north of the base line), were approved by the surveyor general on May 5, 1854. Other maps of said townships on file, showing the location of many donation and other claims were approved on September 25, 1862,

and May 24, 1866, respectively. The field notes accompanying said maps are not to be found in your office. They were before the surveyor general at the time of his certificate above quoted.

I do not think that the concurrent opinions of Shackelford, Abernethy and Roe as to the condition and character of said tract of land on March 12, 1860, based upon personal observation alleged to have been made by them in the year 1885 (twenty-five years afterwards), are sufficient to justify me in certifying that the greater portion of each and every one of said minute subdivisions was at the former date swamp and overflowed land made unfit thereby for cultivation.

The State of Oregon elected to make her own selections of swamp lands by her own agents, and to present proof that the lands selected were of the character contemplated by the swamp land grant. In this case the State of Oregon has offered no proof; and the request of the governor for an opportunity to do so should have been granted.

Your office will therefore direct the local officers to order a hearing to determine what was the character of each and every subdivision of land hereinbefore mentioned on March 12, 1860; and to give notice thereof to the railroad company aforesaid; and to every person who may appear by their records to have an interest in said land under the donation laws, or other laws of the United States. At said hearing the burden of proof will be upon the State of Oregon to show by legal testimony that the greater part of each one of said subdivisions was on March 12, 1860, swamp and overflowed land made unfit thereby for cultivation.

Your office decision of February 19, 1894, is hereby modified in accordance with the foregoing direction.

JUDGMENT—CANCELLATION—SETTLEMENT RIGHT.

OETTEL *v.* DUFUR.

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when said judgment is noted of record in the local office.

An intervening adverse entry defeats a prior settlement right if such right is not asserted within the statutory period.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 3, 1896. (F. W. C.)

I have considered the appeal by Abel H. Dufur from your office decision of June 15, 1894, holding for cancellation his homestead entry covering lot 1, Sec. 23, T. 48 N., R. 4 W., Ashland land district, Wisconsin.

This tract is within the fifteen mile or indemnity limits of the grant made to aid in the construction of the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad. The land is also within the primary limits of the grant made to aid in the construction of the Wisconsin Central and is opposite unconstructed road.

Under the previous rulings of this Department it has been held that the indemnity reservation created on account of the grant made by the act of June 3, 1856, to aid in the construction of the Omaha railroad defeated the grant made by the act of 1864 to aid in the construction of the Wisconsin Central Railroad. *C., St. Paul, M. & O. Ry. Co.* (6 L. D., 195.)

This holding has been reversed by the decision of the supreme court in the case of *Wisconsin Central v. Forsythe* (159 U. S., 46); so that this land must be held to have been a part of the grant to aid in the construction of the Wisconsin Central Railroad, but being opposite the unconstructed portion of that road was included within the forfeiture declared by the act of September 29, 1890.

It appears that on December 5, 1889, the local officers erroneously permitted one R. H. Miller to make soldiers' additional homestead entry of this tract, which entry was held for cancellation by your office decision of April 6, 1891, which decision was affirmed by this Department July 18, 1892.

It must be clear from this recitation that this land was not subject to entry from the time of the withdrawal under the act of 1856, until the cancellation of Miller's entry July 18, 1892.

On April 18, 1891, however, Louis Oettel tendered a homestead application for this land which was rejected for conflict with Miller's entry, from which action he appealed, and upon November 11, following, Dufur also tendered a homestead application for this tract, which application was also rejected for conflict with Miller's entry, from which action he also appealed.

No action appears to have been taken upon these appeals and following the cancellation of Miller's entry, both Dufur and Oettel again applied to make homestead entry of this land. The application by Dufur was tendered September 1, 1892, and was permitted to go of record.

On October 20 following, Oettel again tendered a homestead application, which was rejected for conflict with the entry by Dufur, from which he appealed, and upon the hearing ordered to determine their respective rights in the premises the record now before this Department was made.

From this record it appears that Oettel made settlement upon this land in April, 1891, and has since kept up a claim to the land, although he does not appear to have continued residing thereon.

Under my view of the case, the question as to whether his residence following his settlement in April, 1891, was sufficient to hold the land is not material to the decision in this case, for, if it be admitted that his subsequent actions in connection with this land were sufficient to protect him in his settlement from the time when made, yet to avail him anything under such settlement it is necessary that he should have presented his application within three months from the time the land was properly subject to entry.

In your office decision it is stated that the additional entry made by Miller was canceled on August 20, 1892, which must be based upon the idea that the entry is not canceled until the notation of the formal cancellation of his entry upon the local record.

In the decision of this Department in the case of *McDonald v. Hartman et al.* (19 L. D., 547), on the authority of the decision of this Department in a number of cases therein referred to, it was held—

That a judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date without regard to the time when such judgment is noted of record in the local office.

In order to protect himself in his settlement it was necessary therefore that Oettel should have tendered an application within three months from the date of the cancellation of Miller's entry, which, under the above rule was July 18, 1892. His application was not presented, however, until October 20, 1892, and as Dufur had made entry in the meantime, I must reverse your office decision and direct that Dufur's entry, if otherwise regular, be permitted to stand subject to compliance with the law.

SETTLEMENT RIGHT BEFORE SURVEY—APPLICATION TO ENTER.

WILLIS v. MERRITT.

To protect a settlement right, acquired before survey, against adverse claims the right must be asserted within three months after the plat of survey is filed in the local office.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (J. A.)

The land involved herein is a part of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 20 N., R. 26 W., Missoula, Montana, land district.

Said section 27 lies within the limits of the grant to the Northern Pacific Railroad Company, withdrawn upon general route February 21, 1872. January 18, 1889, a plat of survey of said section was filed in the local land office. On the same day James S. Merritt presented homestead application for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lots 2 and 3 of said section, alleging that said tract was excepted from the grant to the Northern Pacific Railroad Company by reason of the occupancy of the same by *bona fide* settlers on February 21, 1872, and continuously since that time. The homestead application was rejected by the local officers, whereupon Merritt applied for a hearing. The company listed the land for patent September 3, 1889. After decision by this office on July 7, 1893, adverse to said company, its list was canceled by your office on October 3, 1893, as to the land claimed by Merritt. Merritt's homestead application was allowed November 10, 1893, and on December 28, 1893, he made final proof. On the same day C. C. Willis filed an affidavit, alleging—

That in October, 1887, he settled upon unsurveyed public land, now described as the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 27, in Tp. 20 N., R. 26 W., in Missoula County,

Montana, and that he has resided upon said land continuously since said date to the present time, and has improvements upon said tract of the value of \$2000.00; that since the date of his settlement he has been the sole resident and occupant of said land.

Affiant further states that the said tract of land is now claimed by one James S. Merritt, who made final proof upon the same on December 28th, 1893; that to his knowledge the said James S. Merritt has never resided upon the said land and that as affiant verily believes, he (this affiant) is the only person who is lawfully entitled to said tract of land.

He therefore protested against the acceptance of Merritt's final proof as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 27, and requested that a hearing be ordered.

Hearing was had before the local officers March 28, 1894. The testimony shows that Merritt is in possession of about fifteen acres of said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, lying south of a fence which runs through said tract. He has never been in possession of the land north of the fence. In October, 1887, Willis purchased the improvements of a prior settler on the land north of said fence. He has since that time been in possession of the land, and has expended about \$2,000 in erecting improvements. He has not applied to enter the land; does not allege that he is a qualified entryman; and has not claimed any settlement right, but intended to purchase the land in his possession from Merritt after patent to him. He does not pray for relief in his affidavit of protest, and there is nothing in the record to indicate in what manner he intends to secure title to the land.

The local officers recommended the dismissal of the protest on the holding that Willis waived his rights to the land by his failure to apply to enter within three months after the filing of the plat of survey.

On the protestant's appeal, your office, after stating the facts and making reference to section 2274, Revised Statutes, under which one of several settlers on unsurveyed land may, after survey, enter the tract after first executing an agreement to convey to the other settlers the land occupied by them, decided the case as follows:

This land is in an odd numbered section and was within the limits of the grant to the Northern Pacific R. R. Co. Merritt contested the right of the road to the land embraced in his entry, and the right of the road was canceled as to this land, October 3, 1893. Willis had three months thereafter within which to file his claim. Having done so on December 25, 1893, it cannot be said that he has been guilty of laches. *Goodale v. Olney*, 13 L. D., 498.

I do not see that Merritt is entitled to any special consideration by reason of his contest against the railroad. He was only protecting his own interest and incidentally the part of one of the forties claimed by Willis was thrown open to entry.

The contention that Merritt's settlement on the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ gives him a right to land in the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ further than his improvements extended is altogether untenable. Willis purchased his improvements of McGowan before he made settlement and he made settlement and commenced his building before he was notified by Merritt of his claim. But, had this not been so, it would not have affected the case for a settler cannot be permitted to claim land in some quarter adjoining that on which his settlement is made further than his improvements extend, when settlement is made by the parties prior to survey.

Your decision must be reversed. The final proof of claimant will stand rejected as to the SW. $\frac{1}{4}$ NE $\frac{1}{4}$ until Merritt files his agreement to convey to Willis as contemplated by the statute, that part of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ which includes his improvements.

The defendant's appeal from said decision brings the case before the department for consideration.

Willis does not allege that he is qualified to enter the land, except, inferentially, by the statement that he believes that he "is the only person who is lawfully entitled to said tract of land." However, he cannot be heard to assert any claim to the land, even if he had shown that he is a qualified entryman. It was necessary for him, in order to save his rights as against adverse claimants, to apply to enter within three months from the date of the filing of the plat of survey in the local office. (Sec. 2266, Revised Statutes; section 3, act of May 14, 1880, 21 Stat., 140.) He was not relieved from this duty by the fact that Merritt had no settlement claim to the land north of the fence. Neither can he gain anything through the successful issue of Merritt's contest against the Northern Pacific Railroad Company, because Merritt had not entered into any agreement to convey the land to him under section 2274, of the Revised Statutes.

Merritt has the right, by virtue of his homestead application to enter the land, as no adverse claim was asserted within three months after the filing of the plat of survey.

The protest of Willis must therefore be dismissed. The decision appealed from is accordingly reversed.

HOMESTEAD—ACT OF JUNE 15, 1880—CONFIRMATION.

JOHN C. HENLEY.

A cash entry under section 2, act of June 15, 1880, made by a homesteader who has previously thereto voluntarily relinquished the original entry, is a nullity, and therefore not susceptible of confirmation under section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (W. A. E.)

John C. Henley made homestead entry on September 12, 1870, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, T. 16 S., R. 2 W., Montgomery, Alabama, land district, and said entry was canceled April 5, 1871, by relinquishment.

On January 17, 1887, Henley purchased said tract under the second section of the act of June 15, 1880 (21 Stat., 237).

June 6, 1888, your office held Henley's cash entry for cancellation as invalid, for the reason that said tract had been reported in the mineral list of 1879 as valuable for coal, and it thus fell within the class of lands reserved from entry by the act of March 3, 1883 (22 Stat., 487), until offered at public sale.

On appeal, the Department modified your office decision, and directed that Henley's entry be suspended pending the offering of the land at public sale. (9 L. D., 178.)

July 14, 1893, Henley filed a motion to have his entry passed to patent under the seventh section of the act of March 3, 1891 (26 Stat., 1095). Your office forwarded said motion to the Department, and on January 10, 1894, it was returned without action by the Department, and with instructions to your office to take such action thereon as was warranted by the facts and the law.

On October 18, 1894, your office held that the fourth section of the act of June 15, 1880 (under which act Henley purchased said land), expressly provided that said act should not apply to any mineral land of the United States; that Henley's cash entry was therefore invalid when made; and consequently it is not such an entry as is confirmed by the act of March 3, 1891.

Henley's appeal brings the case again before the Department.

It is unnecessary to consider what effect the act of March 3, 1883, had in modifying the operation of the act of June 15, 1880, in the State of Alabama, as Henley's cash entry may be held invalid on grounds other than those assigned in your office decision, grounds which were overlooked in the former decision of the Department herein.

In the case of *Rice v. Bissell*, 8 L. D., 606, it was held that a voluntary relinquishment of the original entry divests the entryman of all claims thereunder, and effectually precludes the right of purchase under section 2, act of June 15, 1880. It was said in that case that:

One who has formally relinquished his right under an entry has just as effectually divested himself of all claim under that entry to the land covered thereby as if he had, by a written instrument, attempted to convey his interest to another. He has by his own free and voluntary act released all claim to the land thereunder, and should not afterwards be allowed to set up a claim upon said entry, unless upon a showing, as for instance of mistake in the execution of the relinquishment, such as would justify the reinstatement of the original entry.

This language was quoted and approved in the case of *Cole v. Reed*, 10 L. D., 588, where the same rule was followed.

Henley's relinquishment of his original entry seems to have been entirely voluntary. By that relinquishment he surrendered all his rights to this land, and thereafter had no greater claim to it, equitable or otherwise, than the veriest stranger. He was not entitled to purchase the land under the second section of the act of June 15, 1880, and his cash entry made under that act was therefore a nullity.

An entry that is a nullity under the law as it existed prior to the act of March 3, 1891, is not susceptible of confirmation under the proviso to section seven of said act. (*Mee v. Hughart*, 13 L. D., 484; *United States v. Smith*, 13 L. D., 533.)

Your office decision is affirmed, Henley's motion is denied, and his cash entry will be canceled.

MINING CLAIM—PROOF OF CITIZENSHIP—SURVEY—LOCATION NOTICE.

ROSE NO. 1, AND ROSE NO. 2 LODGE CLAIMS.

A properly authenticated certificate of incorporation, filed by a corporation that is applying for a mineral patent, is sufficient proof of citizenship under the statute. It is not within the province of the Land Department to determine whether such a corporation is authorized under its charter to take patent for mineral lands.

The official survey of a mining claim must be in accordance with the recorded notice of location as of record at the time of the order authorizing the survey.

In the absence of an organized mining district the record of a mineral location should be made in the recorder's office of the county in which the land is situated.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (P. J. C.)

It appears by the record before me that the Diamond Kyune and Castle Stone Company, a corporation organized under the laws of the Territory of Utah, made application, February 15, 1892, for patent for the Rose No. 1 and Rose No. 2 lode claims, lot No. 38, Salt Lake City, Utah, land district, and after publication notice entry was made September 20, 1894.

On consideration of the matter in due course of business your office, by letter of December 7, 1894, decided:

The record shows that entry was made by the Diamond Kyune and Castle Stone Company, but no copy of the articles of incorporation of said company is on file with the case, nor is it shown for what purpose nor under what law said company is organized nor whether it is authorized by the terms of its charter to take patent for mineral land.

Claimant should, therefore, furnish a certified copy of its articles of incorporation as required by paragraph 76 of circular of December 10, 1891.

The location upon which the survey of said claim was based was made August 31, 1891, but the same was not placed of record until September 14, 1891, while the order for survey was issued on September 9, 1891.

It will, therefore, be necessary to have a new survey of said claim, made upon an order for survey issued subsequent to the recording of the location notice upon which said survey is made. See decision of the Honorable Secretary in case of Lincoln placer claim, 7 L. D., 81.

The claimant will be allowed sixty days from notice in which to furnish the required evidence, in default of which the entry will be canceled without further notice from this office.

From this judgment the claimants appeal, assigning as error the ruling of your office on both the points upon which your judgment is based.

Sec. 2321 of the Revised Statutes provides how proof of citizenship may be made by applicants for patent for mining claims, and among other provisions is found this:

and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

There was filed with the application for patent a certificate of incorporation under the great seal of the Territory of Utah. This was a com-

pliance with the requirements of the statute in relation to citizenship and should have been accepted by your office as such. It is not, in my opinion, within the province of your office to inquire into and determine whether a corporation furnishing this certificate is authorized "under its charter to take patent for mineral lands." If the corporation has complied with the law that is sufficient for the purposes of the government and the inquiry as to whether it can take or hold land is one lodged in the State or Territory granting the charter or the stockholders of the company. At all events, the government has no jurisdiction to make this inquiry in an application for patent, where there has been a compliance with the law. The ruling on this point was therefore erroneous.

By circular of November 20, 1873 (Copp's United States Mineral Lands, 68), the manner in which surveys of mining claims should be made is fully set forth and upon the question here presented it is said:

Under all laws and regulations, whether local or general, the location of a claim in such a manner as to give notice to the world of the nature and extent of the same is not only indispensable, but in most cases, mining claims are initiated thereby, and all subsequent proceedings are based upon and must conform to such location. A failure to make and record the location in accordance with the law and regulations in force at the date of the location will defeat the claim, and if it is not made with such definiteness as to operate as notice to all persons seeking to acquire rights to mining lands, it will be void for uncertainty.

It follows, therefore, that in making surveys of mining claims, it becomes essentially necessary to ascertain the boundaries thereof as established by the original location, for the rights of the claimant are limited and defined by such boundaries. To make a survey in accordance with other lines or boundaries, is tantamount to making a new location of the claim, and the rights of adjoining locators who have complied with the requirements of the law may be interfered with and defeated thereby. The practice of making surveys according to the dictation of parties in interest, instead of in accordance with the original location, has already caused great confusion and been productive of great injury to *bona fide* claimants.

You will, therefore, require the applicant for a survey to furnish a copy of the original record of location, properly certified to by the recorder having charge of the records of the original record of location, properly certified to by the recorder having charge of the records of the mining locations in the district where the claim is situate, and cause all official surveys of mining claims to be made in strict conformity to the lines established by the original location as recorder; etc.

Again, by circular of September 13, 1878 (Id., 71), it is provided:

The survey and plat of mineral claims, required by section 2325, Revised Statutes of the United States, to be filed in the proper land office with application for patent, must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States Deputy Surveyor, such location survey cannot be substituted for that required by the statute as above indicated.

These instructions have been emphasized by departmental decisions in Sulphur Mine, etc. (Id., 248; Lincoln Placer, 7 L. D., 81). In the latter case it was said:

It is insisted by counsel for appellant that this rule was intended only for original locations; but the reason of the rule, and therefore the rule itself, is applicable to amended as well as original locations.

The reason of this rule is peculiarly applicable to the case at bar.

The location certificates of each of these two claims are dated March 11, 1891, and each were filed for record with the county recorder of Utah county, March 18, following. Both locations were amended for the "purpose of more particularly describing the" claims on August 31, 1891, and each filed for record September 14, following.

The survey was made under instructions dated September 9, 1891, and was commenced and completed September 16, 1891.

It will thus be seen that at the date of granting the order for an official survey the amended locations were not of record; hence it follows that the order for the survey must necessarily have been made from the original locations, as it would have been impossible for claimant to have furnished the required certified copies of the amended locations. Now, from an examination of the original and amended certificates it is shown that by the original Rose No. 2 claim was six hundred feet wide by one thousand feet long, while by the amended location it is five hundred and thirty-seven feet wide by fifteen hundred feet in length. The ground located originally in Rose No. 1 was also six hundred feet by one thousand feet, whereas in the amended location it is six hundred by fifteen hundred feet. It will thus be seen that the area claimed by the amendment is considerably greater than by the original. The official survey is shown to have been made in accordance with the amended location. Hence it follows that the official survey was not made of the ground indicated by the order of the surveyor-general, but "in accordance with the dictation of the parties in interest."

It is insisted, however, by counsel that inasmuch as the mining claims are located in an unorganized mining district that there is no necessity under the statute for the location certificate being recorded, as, if the mining district is not organized there is no place in which to record the location, there being no provision of law requiring the location certificate to be recorded in other than the records of the mining district.

This position is not tenable. The organization of mining districts is entirely optional with the miners. There is no law demanding their organization. In the absence of an organized district, the record of mining claims has universally been made in the recorder's office of the county in which the claim is situated. The recording is a necessary part of the location of a mining claim. It is true that the United States statute does not in terms state that the record may be made in the county records, but it does provide that to enjoy all the benefits of their locations, the miner must—

comply with the laws of the United States and with State, Territorial and local regulations not in conflict with the laws of the United States governing their possessory title.

That the claimant in the case at bar recognized the necessity for making a record of its location is shown by the fact that the certificates and amendments were filed with the recorder of deeds.

On the ground last discussed, your office judgment is affirmed.

APPLICATION FOR CONTEST—ATTORNEY—CONTESTANT.

CASNER *v.* REED.

The right of a party to be heard as a contestant against an entry, and applicant for the land covered thereby, will not be recognized where it appears that he is at the same time the attorney of another claimant for the same tract.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (G. C. R.)

Fred W. Casner has appealed from your office decision of October 4, 1894, affirming the action of the register and receiver denying him a hearing on his contest, filed September 19, 1892, against homestead entry No. 24,434, made February 26, 1889, by Cornelius Reed for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 22, T. 11 S., R. 8 W., Topeka, Kansas (Salina series).

The reasons given by the register and receiver for the action taken, and which your office approved, were that there was then a pending contest over the same land brought by the entryman herein (Reed) against one Nicholas Casner, and because the contest affidavit was insufficient.

Besides alleging that your office decision is erroneous in holding that the contest affidavit was insufficient, etc., applicant alleges an additional error in your refusal to consider an alleged protest filed April 30, 1894, against the acceptance of the final proof made by Reed April 20, 1894.

The land above described has been the subject of contest and strife for a period of nearly ten years. One Nicholas Casner made homestead entry thereof on October 22, 1881, and on April 3, 1886, Cornelius Reed filed an affidavit of contest against the entry, charging abandonment. The register and receiver recommended the entry for cancellation, and your office, on appeal, (October 23, 1888,) affirmed that action; and on Casner's failure to appeal, your office canceled the entry as of date January 25, 1889. On February 23, 1889, Casner filed an appeal from your office decision of October 23, 1888. This appeal was denied because filed too late, and on February 26, 1889, Reed made homestead entry of the land. Casner then applied for a writ of certiorari, and this application was denied by the Department, July 25, 1889. Casner then applied for a new hearing, which your office allowed, and on February 6, 1890, the register and receiver again decided against Casner. On appeal, your office, on August 5, 1891, affirmed that judgment, and on November 13, 1891, denied a motion for review.

On further appeal, the Department, on September 12, 1892, affirmed that action.

In a lengthy and well considered opinion, the Department, on December 19, 1893, denied a motion for review.

On July 12, 1894, the Department denied a motion for a rehearing, and your office finally closed the case as to Casner, August 7, 1894.

On January 10, 1895, the Department denied an application for the exercise of the supervisory power of the Secretary.

It is thus seen that action has been taken on this contest, twice by the register and receiver, six times by our office, and five times by this Department.

Appellant herein, Fred W. Casner, is the son of Nicholas Casner, against whom the several adverse actions were taken. It appears also that on June 15, 1891, Nicholas Casner appointed his son, the said Fred W. Casner, as his lawful attorney "to perform all and every act and thing whatsoever requisite," etc., revoking all powers of attorney theretofore given to others, and since his appointment, Fred has appeared actively as attorney in the numerous appeals, applications for hearing, motions for new hearings, etc.

While acting as attorney for his father, and on September 19, 1892, Fred W. Casner applied to make homestead entry of the land; in doing so, he misdescribed the land. While evidently intending to apply for the land upon which his father had made entry, he applied for the W. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of Sec. 23, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 22, of said township and range, and when his application was rejected because the tracts applied for had already been entered, he appealed.

If as attorney he was in good faith in trying to establish the rights of his father under the latter's entry, he could not have been in good faith in trying to secure the land himself. Notwithstanding he appealed, and claimed error in the refusal of the register and receiver to accept his own application to enter, he still continued, long afterwards to urge the rights of his father under the latter's prior application. The two positions were utterly inconsistent, and demonstrate a lack of good faith. He can not be regarded as acting in good faith with the government while pleading the alleged rights of his client to the land under one entry, and at the same time trying to secure the land for himself under his own application. His contest affidavit was filed against Reed's entry on the day he applied for the land (September 19, 1892). His affidavit contained the same misdescription as his application to enter (above set out), and I concur in the judgment of your office that the allegations in said affidavit were not sufficiently specific to authorize a hearing.

Appellant insists that on April 30, 1894, he filed an affidavit and protest against the acceptance of the final proof offered by Reed before the clerk of the district court of Lincoln county, Kansas, on April 20, 1894.

Your office in the decision appealed from states that "no action can be taken thereon, inasmuch as it appears to have been lost."

Appellant files with his appeal what purports to be a copy of the protest alleged to have been filed by him April 30, 1894; he fails to state under oath, however, that the purported copy is in fact a copy of a protest filed by him, and he fails entirely to file "a new protest affidavit," as suggested in the decision appealed from.

In consideration of all the facts and circumstances connected with this case, together with appellant's connection with the case of *Cornelius Reed v. Nicholas Casner*, and the privilege accorded him of filing a new protest affidavit, and his failure or refusal to do so, I think further contests or protests on his part against this entry should not be allowed. The decision appealed from is modified accordingly only in this respect.

PRACTICE—NOTICE OF APPEAL—RULES OF PRACTICE.

GIBSON ET AL. *v.* LASCY.

Failure to serve notice of appeal upon the opposite party can not be excused on the plea of ignorance of the law and rules of practice.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (W. A. E.).

Albert Lascy, through his attorney, has filed motion to dismiss the appeal of David Gibson and Otto Mentzel from your office decision of May 17, 1895, adverse to them, in the case of *Gibson et al. v. Lascy*, involving homestead entry No. 6292, made December 30, 1893, by Lascy, for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10; the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lot 8, of Sec. 11, T. 6 N., R. 13 E., M.D.M., Sacramento, California, land district.

The record shows that on January 19, 1894, Lascy gave notice of his intention to submit final proof before the register and receiver on the 10th of March following; that prior to the latter named date Gibson and Mentzel filed affidavits alleging that said tract is mineral in character; that final proof was offered at the appointed time and the final proof witnesses were cross examined by the attorney for the contestants; that a further hearing was had on the charges alleged; that the register and receiver sustained the contestants' charges and recommended the cancellation of the entry; that on appeal by Lascy, your office by letter of May 17, 1895, reversed the finding of the register and receiver and held the tract to be agricultural in character.

Notice of the decision of your office was served upon the contestants, through their attorney of record, on May 25, 1895, and on July 18, 1895, appeal was filed. There is no evidence that this appeal (which is in the nature of a general argument and does not specifically point out any errors in the decision complained of) was ever served upon the opposite party. By letter of August 7, 1895, your office directed the register and receiver to notify the contestants that they would be allowed fifteen days in which to furnish evidence that a copy of said appeal was served upon the defendant within the time allowed by the rules of practice. Notice was so given to each of the contestants by registered mail on August 14, 1895, but the required evidence has not been furnished. Instead, a personal letter, signed by Otto Mentzel, one of the contestants, was mailed to the Assistant Commissioner of

the General Land Office on September 10, 1895, in which it is stated that the contestants are too poor to longer employ an attorney and that they themselves prepared the appeal; that not being familiar with the land laws and rules of practice they may have made some mistakes, which they hope will be overlooked in consideration of their poverty and good faith.

Rule 93 of practice requires that—

A copy of the notice of appeal, specifications of errors, and all arguments of either party shall be served on the opposite party within the time allowed for filing the same.

In the case of *Cone v. Bailey*, 10 L. D., 546, it was held that ignorance of the law and poverty can not excuse an appellant from complying with the plain rules of practice.

The motion will therefore be sustained and the appeal dismissed.

PRACTICE—NOTICE OF CONTEST—PERSONAL SERVICE—AFFIDAVIT OF CONTEST.

BUTTS v. HELM.

In the personal service of notice of contest rule 9, of the rules of practice, does not require an exhibition of the original notice when a copy thereof is delivered to the defendant.

Though the charge in an affidavit of contest may be general in character it will not be held error on the part of the local office to proceed with the hearing where the alleged default, if found true, calls for cancellation of the entry.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (J. McP.)

The land involved herein is the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$ section 34, T. 7 S., R. 17 E., Stockton, California, land district.

James B. Helm made timber culture entry, for the above described land, November 30, 1888, and on March 19, 1894, Butts filed affidavit of contest alleging that, defendant—

has not at any time plowed or cultivated five acres of said land and has never done any plowing thereon except to plow 21 furrows about 20 yards long. He has not at any time since his entry put in any crop upon said land and has not raised any timber of any kind. The land has been fed by sheep each year.

Notice was issued, citing Helm to appear at the local office, April 26, 1894, to defend said case.

The notice was served by the contestant, by delivering to the entry-man in person, a copy thereof, enclosed in an unsealed envelope.

At the trial, the plaintiff appeared, with his attorney and witnesses. The defendant, appeared specially and objected to the jurisdiction of the local office, on the ground that the notice of contest was not served on him in accordance with the rules of practice.

The register and receiver held that service of contest notice in the manner hereinbefore described was sufficient, and overruled the objec-

tions, whereupon the defendant filed a motion asking that the contest be dismissed, for the reason that no cause of action was set out therein. This motion was also overruled by the register and receiver, to which action the defendant saved his exceptions.

The plaintiff offered testimony in support of his charges and the defendant after plaintiff had rested his case, moved that the contest be dismissed, for the reason,

that there is no evidence to establish that the defendant failed to plow five acres the first year ending November 30, 1889. No evidence to establish that he failed to plow the second five acres the second year, or cultivate the first five acres. There is no evidence whatever that the defendant has failed to plant the land in tree seeds, cuttings on the requisite number of acres. And there is not proof of corroboration of the requisite number of witnesses required to establish the case.

The local officers overruled the motion to dismiss, and the defendant failing to furnish testimony in his behalf, decided the case on the testimony adduced by the plaintiff, holding that plaintiff had established a prima facie case of default, and recommending the cancellation of the defendant's entry.

Helm appealed, assigning as error, the ruling of the local officers, holding the service of contest sufficient, their action in sustaining the affidavit of contest, and their refusal to dismiss the contest, on the merits of the case.

In the decision complained of, you sustained the rulings of the local office, on each proposition and the appeal of Helm to this Department, brings into question the correctness of your judgment therein.

It is not denied that Butts delivered a copy of the notice of contest to Helm, but the appellant claims that appellee did not exhibit the original notice of contest, when he delivered the copy to him, and he maintains that personal service of contest notice should consist of an exhibition of the original notice together with a delivery of a copy thereof.

Rule 9, of the Rules of Practice is as follows:

Personal service shall be made in all cases when possible if the party to be served is a resident in the State or Territory in which the land is situated, and *shall consist* in the delivery of a copy of the notice to each person to be served.

The rule does not require an exhibition of the original notice, when the copy is delivered to the person to be served, and there was no error in the ruling of the register and receiver.

The charges preferred against said entry are, it is true very general, but the contestant is not required to confine his charges to any particular period of the existence of the entry, nor to specify each year in which the alleged default occurred, if he by a general statement includes them all. The charges if true, are sufficient to require a cancellation of the entry, therefore it was not error to proceed with the trial of the case, to determine the truthfulness thereof.

The concurring decisions of your and the local office as to the facts in the case, are sustained by the record; and your judgment is affirmed.

CONTESTANT—PRIORITY OF RIGHT—SECOND CONTEST.

CURTIN ET AL. *v.* MORTON.

The right of a contestant to be heard will not be defeated by a hearing inadvertently ordered on a later contest.

An issue once tried and determined cannot be made the basis of a second contest.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (A. E.)

The record in this case shows that on April 2, 1877, Howard Morton made desert land entry No. 534, of the S. $\frac{1}{2}$ and the NW. $\frac{1}{4}$, Sec. 30, Tp. 28 S., R. 25 E., Visalia, California. This entry was suspended on September 28, 1877, and the suspension revoked February 10, 1891.

On June 10, 1891, John Curtin filed affidavit of contest against the entry, alleging substantially that the tract was not desert land, that it had not been reclaimed, and that the entry had been made for speculation.

On May 19, 1893, Richard T. Marks filed affidavit of contest, making similar charges against Curtin's entry. By mistake the local office issued notice on Marks' contest affidavit, though Curtin's was anterior.

A hearing was had June 29, 1893, and defendant made default. Before the local office made any recommendation Curtin's attorney filed a motion to set aside the proceedings on Marks' affidavit. This was granted, because Curtin's affidavit had precedence, and Marks appealed.

Proceedings on Curtin's affidavit were then had, and on the record made up the local office recommended that Curtin's contest be dismissed. No appeal was taken from this and your office dismissed his contest.

Passing upon the appeal of Marks from the action of the local officers in setting aside the proceedings on his contest, your office held that such action was correct. Your office then dismissed Marks' contest because his contest affidavit contained the same allegations as those disproved at the hearing on the Curtin contest.

From this Marks has appealed to this Department.

The status of Curtin and Marks is controlled by the case of *Spencer v. Blevins et al.* (12 L. D., 318), wherein this Department gave the preference to the one who first filed the affidavit of contest, provided he sustained his allegations.

The only question therefore which is left to determine is, whether the contest of Marks should be dismissed because his allegations were the same as those made by Curtin, who had not sustained them.

It has generally been ruled by the Department that an issue once tried and determined can not be made the basis of a second contest. *Gray v. Whitehouse* (15 L. D., 352). It has not been shown by appellant that the case under consideration so differs from that cited that this ruling should be departed from, and therefore the action of your office is affirmed.

PATENT—TITLE BY RECORD—JURISDICTION.

SPIRLOCK *v.* NORTHERN PACIFIC R. R. Co.

The record of a perfect patent duly enrolled divests the Department of all jurisdiction over the land covered thereby.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 4, 1896. (W. M. B.)

The W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 16 N., R. 1 W., Olympia land district, Washington, is within the primary limits of the grant to the Northern Pacific Railroad (main line).

Map of general route was filed in the General Land Office August 13, 1870, by which said act of filing a statutory withdrawal—operative from said date—was made of all lands embraced in the odd numbered sections within designated limits; map of definite location of line of railroad being filed September 13, 1873.

James D. Spirlock made private cash entry of the tract of land above described and received final certificate therefor on September 17, 1870, and bases his claim to this land upon said purchase and the perfect record of what purports to be a perfect patent thereto.

An examination of the records in your office shows that one Jeremiah Mabie made a pre-emption filing with alleged settlement prior thereto; upon the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 5, township and range aforementioned, previous to the date of the grant to said railroad company; and that said filing was of record, subsisting and *prima facie* valid at the date of said grant, which excepted said forty-acre tract from the operations of the grant, and left Spirlock free to purchase the same in the absence of any adverse right.

By virtue of said fact the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 5, in the township and range hereinbefore described (40 acres) is the only tract or legal subdivision, with regard to which any question can properly arise respecting a superior claim or right thereto by the plaintiff or the defendant.

Hence the questions presented for consideration and determination are (1) does the perfect record of a perfect patent to the land involved—found properly enrolled in record book of patents in your office—invest Spirlock with full and complete title to the said tract of land? and (2) does the existence of such a record deprive the government of any further jurisdiction in the matter?

The record shows that a patent was issued to James D. Spirlock, conveying to him the land in controversy, bearing date May 1, 1872, which was properly recorded in volume 6, page 278, in the office of the recorder of this Department. Thus it will be seen that the Depart-

ment is deprived of any further jurisdiction over this land. See *United States v. Schurz* (102 U. S., 378), wherein it was held that

title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title.

There was found in the land office, among the papers in the case, an incomplete patent, in this, that it had no seal attached thereto; but the record shows that a patent was issued and recorded, as above stated, complete in all respects. This incomplete patent found among the papers in the land office does not impeach the record.

Inasmuch as there appears of record a patent regularly issued, the Department is deprived of any further jurisdiction in the matter. The decision of your office is therefore reversed.

RAILROAD GRANT—SETTLEMENT RIGHT—ACT OF MARCH 3, 1887.

NORTHERN PACIFIC R. R. CO. *v.* NORTH.

The occupancy of a tract by a qualified pre-emptor at the date of definite location excepts the land from the operation of the grant; and the fact that the subsequent filing of the pre-emptor did not include said tract can not be taken as proof that he had abandoned his claim thereto at the time the grant became operative.

A settlement right acquired after December 1, 1882, and prior to the passage of the act of March 3, 1887, defeats the right of purchase under section 5 of said act.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (J. A.)

The land involved in this appeal is the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 33, T. 10 N., R. 36 E., Walla Walla land district, Washington.

The land is within the limits of the grant to the Northern Pacific Railroad Company, but was excepted from the operation of the withdrawal upon general route on August 13, 1870, by reason of a pre-emption filing made June 7, 1870. August 30, 1870, James H. King made homestead entry, which was cancelled March 25, 1873. Since that date there are no claims of record to the land until October 4, 1880, the date of definite location.

March 18, 1884, Clarence C. North filed pre-emption declaratory statement for the land alleging settlement on the same day. June 11 1884, Nathaniel P. Hall made homestead entry. February 4, 1885, North submitted final proof. Hall protested against the acceptance of the proof, alleging that he had purchased the land from the Northern Pacific Railroad Company in 1881, and that North has not complied with the pre-emption laws. Hearing was had before the local officers,

who rendered decision recommending that North's final proof be accepted.

February 25, 1885, the Northern Pacific Railroad Company protested against the allowance of North's claim, and requested that Hall's title to the land, acquired by purchase from said company be confirmed.

October 28, 1886, your office directed the local officers to order a hearing for the purpose of determining the rights of the respective parties in interest, the exact status of the land October 4, 1880, the date of the definite location of the road, and its condition from March 25, 1873, the date of the cancellation of King's homestead entry, up to March 28, 1881, the date of the company's deed to Hall. Hearing was had and decision rendered by the local officers adverse to the Northern Pacific Railroad Company and Hall.

After the passage of the act of March 3, 1887 (24 Stat., 556), Hall applied to purchase the land under the provisions of section 5 of said act.

May 25, 1894, your office rendered decision finding that Robert Mason, a qualified pre-emptor, purchased the improvements on the land in 1872, and that he occupied and cultivated the land on October 4, 1880, the date of definite location, with the intention of obtaining title to the same from the government. It was, therefore, held that the land was excepted from the operation of the grant to the Northern Pacific Railroad Company, and that Hall's application to purchase under the act of March 3, 1887 (24 Stat., 556), was defeated by North's settlement, which was made after December 1, 1882. Hall's homestead entry was held for cancellation, and North's final proof was accepted.

The Northern Pacific Railroad Company appealed from said decision assigning errors:

1. In holding that Mason's occupancy of the land October 4, 1880, was of a nature to except the tract from the grant.

2. In holding that North's settlement made after December 1, 1882, defeated Hall's application to purchase the land under the act of March 3, 1887, in case the land was excepted from the grant.

In 1872 Mason settled on the land in question together with the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of section 32, adjoining the land on the west. He had exhausted his homestead rights. In 1873, he offered to file pre-emption declaratory statement, which was rejected for the reason that the land now in question lies in an odd numbered section. He took no further action until October 6, 1880, two days after the definite location, when he filed pre-emption declaratory statement for the land claimed by him in section 32. He made final proof for that land in June, 1881.

The appellant contends that it must be inferred from the fact that Mason filed his statement for the land in section 32 on October 6, 1880, that he did not intend on October 4th to acquire title to the land in section 33 from the government.

Mason testified that he cultivated the tract in section 33 until Octo-

ber, 1882, intending to acquire title to the same from the government. He had no settlement rights after October 6, 1880, the date of his pre-emption filing. The fact that he made pre-emption filing on that day for the eighty acre tract in section 32 cannot be considered as proof of intention on October 4, 1880, to abandon the land claimed by him in section 33.

Hall's application to purchase was properly rejected and his homestead entry cancelled. The decision appealed from is, therefore, affirmed.

ADJOINING FARM ENTRY—ADDITIONAL HOMESTEAD ENTRY.

ANDREW J. WHITEHAIR.

The right to make an adjoining farm entry under section 2289 R. S., is limited to the owner of an original farm who did not acquire title thereto through the provisions of the homestead law.

The right to make an additional homestead entry under the act of March 2, 1889, cannot be exercised by one who made his original entry after the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (J. McP.)

Andrew J. Whitehair has appealed to this Department from your office decision "C" of October 10, 1894, denying his application for additional entry under the provisions of Sec. 2289 (R. S.), for lots 3 and 4 Sec. 35, T. 20 N., R. 2 W., Perry, Oklahoma, land district.

It appears that on July 20, 1891, the appellant made homestead entry, No. 7660, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and lots 5 and 6, Sec. 35, T. 20 N., R. 2 W., Guthrie land district; that the land now applied for was then not subject to entry, being situated in the country known as the "Cherokee Outlet," and that it was opened to settlement on September 16, 1893, by the President's proclamation of August 19, 1893.

It is claimed by the appellant that he resides on the land embraced in his homestead entry, No. 7660, adjacent to the land applied for herein, and that on September 16, 1893, he went upon the land now in controversy and staked the same, and that he subsequently fenced said land, believing that he had a right thereto as an additional entry.

The land applied for cannot be entered as an adjoining farm under the provisions of section 2289 (R. S.), as it is well settled that in order to make such entry, the applicant must be the owner of the original farm and have acquired title thereto other than through the provisions of the homestead law. (John B. Doyle, 15 L. D., 221; John W. Cooper *et al.* 15 L. D., 285.)

The application cannot be allowed as an additional homestead entry, since the original entry was made subsequent to the act of March 2, 1889. *Vide* John W. Cooper *et al.*, *supra*. Nor will it avail the applicant that the land applied for was not subject to entry at the time he made his original entry. Only one entry is allowed under the home-

stead law, and if the home-seeker elects to enter less than 160 acres, he exhausts his homestead rights as completely as if he had entered a full quarter-section of land, unless it is otherwise specially provided by law.

There was no provision in the act opening the "Cherokee Outlet" to settlement, allowing those who had entered less than a quarter-section of land in Oklahoma, adjoining the "Cherokee Outlet," to take adjacent lands, in said "Outlet," sufficient to make a full quarter-section.

Your decision is affirmed.

CONTESTANT—APPLICATION TO ENTER.

LEWIS S. MILLINGAR.

An application to enter filed by the contestant of a homestead entry at the time of filing his affidavit of contest confers no right in the event of his securing a judgment of cancellation, and cannot be used by him in the exercise of his preferred right.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (W. F. M.)

On October 30, 1893, Lewis S. Millingar filed an affidavit of contest against the homestead entry of Vinnie Best *et al.*, made June 5, 1886, at Pueblo, Colorado, for the SE. $\frac{1}{4}$ of section 27, township 22 S., range 42 W., and at the same time filed his own application, homestead affidavit and non-mineral affidavit for the same land. The contest was prosecuted to a successful issue, and the entry held for cancellation.

Millingar has appealed here from the decision of your office denying his application for the return of the homestead papers into his possession, to the end "that his homestead entry may be perfected."

Your denial of this application is based on the—

reason that said application to enter having been made when said land was not subject to disposal, conferred no rights upon the successful contestant.

Insomuch as the papers could not be made effective for the purpose for which they are wanted, it would seem to be a vain thing to comply with the appellant's request. *Ady v. Boyle*, 17 L. D., 529; *Holmes v. Hockett*, 14 L. D., 127.

The decision of your office is affirmed.

TIMBER AND STONE ACT—UNOFFERED LAND.

PIERCE v. WYMAN.

Offered lands withdrawn for the benefit of a railroad grant, on subsequent restoration to the public domain, fall within the category of "unoffered" lands, and are therefore subject to disposal under the timber and stone acts.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (G. C. R.)

On July 7, 1893, Homer V. Wyman made entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 33, T. 49 N., R. 7 W., Ashland, Wisconsin, under the act approved June 3, 1878 (20 Stat., 89), entitled

an act for the sale of timber lands, etc., as extended by the act approved August 4, 1892 (27 Stat., 348), to all the public land states.

On October 12, 1894, William Pierce filed his protest against the issuance of patent upon said entry, on the grounds that the land embraced in the entry was offered for sale May 2, 1853, and was therefore not subject to entry under the provisions of the timber and stone act (*supra*), for the reason that said act only provides for such entries upon lands "which have not been offered at public sale, according to law;" that he is interested in the lands as a homestead, inasmuch as he had, on October 5, 1893, made homestead application therefor, which application was rejected for the reason that the lands were covered by Wyman's entry.

Your office, by decision dated November 3, 1894, denied a hearing, upon the doctrine announced in your office letter ("H") of the same date, in the case of *Cook v. Okerstrom*.

An appeal brings the case here.

From information received at your office, it appears that the land was in fact offered at public sale, July 4, 1853. It fell within the primary limits common to the grants made by the act of May 5, 1864, for the Chicago, Saint Paul, Minneapolis and Omaha Railway Company and the Wisconsin Central Railway Company, and was of the lands allotted on account of the grant for the last mentioned company.

The line of the road of the Wisconsin Central was not constructed opposite this land, so the land was restored under the forfeiture act of September 29, 1890.

The land having been restored to the public domain, the question presented is, whether the same having been once offered, is now subject to entry under the timber and stone act.

The withdrawal of the lands from market abrogated the original offering, and the subsequent restoration did not restore them as offered lands, but as lands that had practically never been offered. *Julius A. Barnes*, 6 L. D., 522; see also *Eldred v. Sexton*, 19 Wall., 189, and *Anway v. Phinney*, 19 L. D., 513.

The decision appealed from is affirmed.

FORT SANDERS MILITARY RESERVATION—ACT OF JULY 10, 1890.

JABEZ B. SIMPSON ET AL.

The preferred right accorded to "actual occupants" of the lands formerly embraced in Fort Sanders military reservation is limited to one entry by persons who have established residence on the land involved, and it accordingly follows that such right can not be exercised by a married woman whose husband perfects a claim for another tract under the same statute.

Secretary Smith to the Commissioner of the General Land Office, February 4, 1896. (G. C. R.)

On November 5, 1890, Jabez B. Simpson made desert land entry No. 3695, for the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lots 1, 2
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and 3 of Sec. 34, T. 15 N., R. 73 W., Cheyenne, Wyoming. Final certificate No. 1209 was issued to him January 27, 1894.

On November 6, 1890, Cairra M. Simpson made desert land entry No. 3994 for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section.

Both entries, with the exception of said lot 1, embrace land within the original Fort Sanders military reservation, which was restored to the public domain by the act approved July 10, 1890 (26 Stat., 227). The act makes the lands "subject to disposal under the homestead law only," with a proviso:

That actual occupants thereon upon the first day of January, 1890, if otherwise qualified, shall have the preference right to make one entry, not exceeding one quarter section, under either of the existing land laws, which shall include their respective improvements.

The entries in question were made under said proviso.

Mr. Simpson accompanied his application with an affidavit, stating that he had been in the actual and continued possession of the land since 1884, and that his improvements thereon consist of one stone house of six rooms, barns, corrals, sheds, fences, ditches—in value from eight to ten thousand dollars. In his final proof he states that "no other person, company, or corporation, has any interest whatever in said entry or tract of land but Cairra M. Simpson, a *housekeeper*, and Frank Simpson, a *conductor*," etc.

Cairra M. Simpson, in a sworn statement accompanying her application, stated that she had been "in actual and continued possession of said described lands and the improvements thereon since the year 1884," etc.

It thus appearing probable that the said Jabez B. and Cairra M. Simpson were husband and wife, your office, on July 17, 1894, directed that the said Cairra M. be called upon to make affidavit as to whether she was the wife of the said Jabez B. Simpson, your office holding that "actual occupancy" must be shown to authorize the entry, and that husband and wife can not maintain separate residences at the same time, citing Hattie E. Walker (15 L. D., 377), and that if they were in fact husband and wife, they could not hold both entries, and sixty days were allowed them to elect which entry to retain.

Notice of this requirement was served on the parties, and no response was made thereto, except that the attorney for the entryman, in a letter to the register, insisted that "occupation of the land by using the same as a pasture gave the occupant a preference right to enter it under the then existing laws."

Your office, on September 10, 1894, adhered to its former ruling requiring "actual inhabitancy" to be shown.

Both Jabez B. and Cairra M. Simpson have appealed to this Department.

Just why Mr. Simpson should feel personally aggrieved by the action of your office is not very clear. His final proof appears to have been

approved, and he was given the rather questionable right to elect which of the two entries he would relinquish, on the presumption that he was the husband of Caira M. Simpson. There was no right denied to him, and his appeal is hereby dismissed.

It will be noticed that Caira M. Simpson stated that she had been "in actual continued possession" of the lands since 1884. The particular point involved in this controversy is, whether this statement, admitting its truth, gives her the preference right to make entry of the land under either of the land laws.

As a condition precedent to this right, it must be shown that the applicant is an "actual occupant thereon."

An occupant is one who has the actual use or possession of a thing (Bouvier). But the statute expressly requires that the occupancy shall be "thereon," meaning actual inhabitancy or residence on the land before the privilege of the preference right can be given, and then it shall not cover more than one quarter section, including the improvements, etc. This requirement was not met.

Moreover, but one entry is allowed. I think it may be fairly inferred that Jabez B. and Caira M. Simpson are husband and wife, since they refuse when called on to deny that inference; and to allow both to make entries would be contrary to the intent and spirit of the statute.

For the reasons given, the decision appealed from is affirmed. (Fort Sanders, 14 L. D., 622; Piper v. State of Wyoming, 15 L. D., 93.)

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. v. RICHARDS.

An indemnity selection of land occupied by one who at such time had exhausted his rights under the settlement laws, is not defeated by the subsequent qualification of the occupant to make a second homestead entry under the act of March 2, 1889.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (J. L. McC.)

I have considered the case of the Northern Pacific Railroad Company v. J. W. Richards, involving the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1, 2, and 3, of Sec. 13, T. 14 N., R. 4 E., Walla Walla land district, Washington.

The land is within the indemnity limits of the grant to the company named, and was selected by said company on December 17, 1883. On September 29, 1885, Richards applied to file pre-emption declaratory statement for the land; but his application was rejected because of said prior selection by the railroad company. He appealed to your office, which directed a hearing. At the hearing the testimony taken showed that one Philip Cox occupied the land about the time of its selection by the company; but whether he abandoned it or perfected his entry

was not clearly shown. Thereupon your office, by letter of February 20, 1895, instructed the local officers to notify Richards that he would be allowed sixty days in which to furnish evidence as to the facts regarding Cox's occupation of the land.

Richards forwarded an affidavit executed by Cox, which was by the local officers and your office, held sufficient to show that the land was not subject to selection by the company on December 17, 1883. From said decision of your office (dated June 3, 1895), the company appealed.

The substance of said affidavit was that on December 17, 1888 (the date of the company's selection), and for a considerable period prior and subsequently to that date, Cox was residing upon and claiming said land; that about 1866 he resided upon and claimed, for about a year, certain land in sections 6 and 7, T. 9 N., R. 38 W., Washington; but whether he made homestead entry of the land last described he seems uncertain; also that he is a native-born citizen of the United States.

The decision of your office (of June 3, 1895, *supra*), states that the records show that said Cox, on March 21, 1865, made homestead entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, and NE. $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Sec. 7, T. 9 N., R. 38 W., Washington; but that said entry was voluntarily relinquished by Cox, and for that reason cancelled on March 28, 1867.

Cox says nothing whatever regarding his qualifications as a pre-emptor.

As Richards is the assailant of the selection of record, the burden is upon him to show that such selection was invalid.

Your office decision appealed from finds and holds, in substance, that inasmuch as the second section of the act of March 2, 1889 (25 Stat., 854), entitled Cox to make a second entry under the homestead law, he was a "qualified claimant under the homestead laws"; it therefore holds the company's selection for cancellation, with a view to the allowance of Richards' pre-emption application.

I can not concur in this conclusion.

It is a well established principle that the right acquired by an indemnity selection is dependent upon the status of the land *at the date of selection* (Hastings and Dakota Ry. Co. v. St. Paul, Minneapolis and Manitoba Ry. Co., 13 L. D., 535, and many other cases).

The land in controversy was on December 17, 1883, occupied by a person who at that date appears to have been disqualified to enter the same, and the land was therefore then subject to selection. Having been selected, the subsequent act of March 2, 1889, restoring the right of persons who had previously made entry, simply gave them the right to enter any portion of the public domain that might be found subject to entry at the date of application, but did not affect the status of lands to which the rights of other parties had previously attached.

The decision of your office is reversed, and the railroad company's selection will remain intact.

MINERAL PATENT—ERRONEOUS SURVEY—SECOND PATENT.

UNITED STATES *v.* RUMSEY ET AL.

In case of a mineral patent based upon an erroneous survey, a new patent can not issue without a proper application under a corrected survey; and if the patentee refuse to surrender the patent, so issued by mistake, and reconvey the land embraced therein, suit to recover title should be instituted by the government.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (P. J. C.)

The Department is in receipt of your letter ("N") of January 16, 1896, in reference to the Little Nell lode, mineral entry No. 2505, Helena, Montana, land district, patented to Israel P. Rumsey *et al.*, April 9, 1892.

It appears that the official survey of this lode claim fixed its locus in sections 19 and 30, township 9 N., range 2 W., whereas subsequent examination shows this to have been erroneous, and as a matter of fact it is just one mile north and in sections 18 and 19. This mistake was made, according to the report of the deputy surveyor, because—

The section corner of township line between township 2 and 3 west, set for corner between sections 18 and 19, was incorrectly marked, having been marked to represent the position two miles north and four miles south of the township line, which would indicate it to be the southwest corner of section 19. This corner was the one from which I determined the location of the claim above referred to, and accounts for the improper or erroneous connection line returned in my official survey.

By your office letters of August 10, 1894, November 19, 1894, and February 11, 1895, the patentees were required to surrender their patent and reconvey to the United States, when, after correcting the field notes and plat, making proper notice by publication and posting, a new patent correctly describing the claim would issue. No response seems to have been made to these demands by any one shown to have an interest in the property. I find in the files a letter from one A. S. Hovey, in which reference is made to your office letter of August 10, 1894, but there is nothing in the letter or the papers to show what, if any, interest he has in the premises, or what right he has to represent the parties in interest.

In this letter it is suggested that the owners are willing to surrender the patent upon assurance that the Department would issue another, correctly describing the claim. In response to this it is said in your said letter to this Department: "I doubt the propriety of this course, however, because of the fact that no notice has ever been given of application for patent, correctly describing the claim."

There is no way in which the government can grant its patent, except upon a compliance with the law by those seeking it. The locus of the Little Nell has never been correctly fixed. This is absolutely required,

both to keep the records in your office in correct condition, and to notify others who may have adverse rights in the land.

I therefore concur in your conclusion that a new patent can not issue without a proper application under a corrected survey, and that if the owners will not surrender the patent and reconvey to the United States the land described therein, a recommendation for suit to vacate the patent should be made to the Department of Justice.

I would suggest, however, that your office cause notice of this decision to be served on the owners of the Little Nell, together with a demand to surrender the patent and reconvey to the United States the land described in the patent within a reasonable time. On their failure or refusal so to do, you are directed to cause certified copies of such papers as are required to be made, and transmit the same to the Department for the purpose of laying the same before the Honorable Attorney-General of the United States, with a recommendation for suit to vacate the patent because issued through mistake.

OKLAHOMA TOWN LOTS—SEPARATE INTERESTS.

WOODSON ET AL. v. JOHNSON ET AL.

Townsite trustees should not execute deeds for fractional parts of a town lot, but for the protection of separate interests therein may, on joint application, deed to the several parties jointly the entire lot according to their respective holdings.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (P. J. C.)

The land involved in this appeal is lots one and two, block eight, Lisbon, now Kingfisher, Oklahoma Territory.

The record before me shows that the municipal authorities of Lisbon issued certificates of lot ownership August 28, 1889, to J. T. O'Donnell for lot 1, and to O. L. Seebolt for lot 2, both in block 8, of said town. These certificates are to the effect that the claimants are "entitled to the right of ownership and possession" of the lots, "subject, however, to all future acts of Congress," and the mayor and counsel guarantee unto their "heirs and assigns quiet and peaceable possession of said property."

On August 24, 1889, Seebolt, by a quit claim deed conveyed, for the expressed consideration of \$200, lot 2 to Lucy R. Scott, and on September 27, following O'Donnell, for the same consideration, transferred to her lot 1.

On March 15, 1890, Scott and husband conveyed to J. K. Woodson, for the expressed consideration of \$450, fifty feet off the "west or rear portion of" said lots, "making a piece of ground fifty by fifty feet square," and on March 18, following conveyed for the expressed consideration of \$50, to M. C. Brownlee "ten by fifty feet off of that por-

tion of lots one and two in block eight lying east of the portion of said lots conveyed to J. K. Woodson."

On September 6, 1890, Lucy R. Scott made application for deed "to board No. three of townsite trustees" for the whole of said lots.

On September 8, 1890, William G. and Alexander C. Johnson made a similar application for the same lots, alleging that they were the first and only legal claimants therefor, having settled thereon April 28, 1889, and commenced improvements. On September 10, following John H. Burnett also made a similar application for the same lots, making substantially the same allegations.

A hearing seems to have been had between the Johnsons and Burnett and Scott, but after the testimony had been taken, a compromise was effected between them, and a quit claim deed, dated February 4, 1891, is exhibited by which Scott and husband transferred for the expressed consideration of \$1,000, and the grantees assuming the indebtedness against the improvements, to H. G. Johnson and John H. Burnett said lots, including all improvements thereon. On the following day, February 5, Brownlee and Woodson filed separate affidavits, in which they set forth their purchase of a part of the lots as detailed above, their permanent improvements thereon, their continuous occupancy thereof, and the further fact that each had relied on Scott procuring the government title to said lots, they each paying their proportion of the expense attending this; that now, in fraud of their rights, Scott has transferred all of said lots to Johnson and Burnett. They protest against the issuance of patent to them, and each makes application to purchase that part of the lots deeded to each by Scott. On the same day A. C. Johnson quit-claimed to W. G. Johnson and Burnett all his right to the lots.

As a result of the hearing the townsite board decided in favor of the protestants, and awarded to them the portions of the lots transferred by Scott. On appeal, your office, by letter of April 9, 1894, affirmed their action, whereupon the defendants prosecute this appeal, assigning error both of fact and law.

From an examination of the testimony I am satisfied that your office decision fairly and sufficiently states the facts, and I concur therein.

It may be necessary, however, to refer to the main features in controversy, as the question involved is a new one. The certificates of ownership to Seebolt and O'Donnell were issued August 28, 1889, and in August and September of the same year they conveyed to Scott. On March 15, 1890, Scott conveyed to Woodson. It is shown that "early in the summer of 1889, May or June," she erected a house on that portion of the lot costing from \$700 to \$1,000, and had been in possession of the same. The conveyance to Brownlee by Scott was March 18, 1890, for the ten foot strip upon which Brownlee had a two story house ten by twenty-five feet, costing \$350 to \$400, which was also built in the summer of 1889. So far as the record discloses there seems

to have been no controversy between these parties, and that they thus amicably adjusted their several rights to the lots. It was not until the advent of the subsequent grantees of Scott, under a deed conveying the lots as an entirety, together with all improvements thereon, that Brownlee and Woodson had any apprehension of their title. Under the circumstances they were fully justified, in my opinion, in moving to protect their rights, and from the testimony it is clear that they are entitled to their proportion of the lots involved.

A difficulty arises, however, as to the method by which they can secure title to fractional portions of these lots. It has been recently decided by the Department in *J. F. McGrath et al.* (20 L. D., 542), that

the execution of deeds (by the trustees) to fractional parts of surveyed and numbered lots, or to lots described by metes and bounds, which did not conform to the survey, would be unauthorized, and soon result in interminable confusion and mischief.

This expression of opinion as to the right of the trustees to convey fractional parts of lots would seem to be conclusive, and to require the trustees to give deeds by what may be termed, for the purposes of this discussion, the legal subdivisions; that is, for lots as an entirety.

In view of this authority the decisions below, holding that deeds shall issue to each party for the portion found to belong to each, must be modified. It seems to me, however, that there can be no objection to requiring the parties hereto to make a joint application for deed, and that the trustees may make a deed to them jointly for said lots. This method would enable the parties, if they cannot amicably settle their proportionate rights to the land, to go into the local courts and have it properly adjusted.

The order will therefore be that the parties hereto, Josephine K. Woodson, Mary C. Brownlee, William G. Johnson, and John H. Burnett, shall, within sixty days from receipt of notice of this decision, make joint application for deed to lots 1 and 2, block 8, Kingfisher, Oklahoma, each paying for the land according to their holdings under this judgment; that is, Woodson fifty by fifty feet, Brownlee ten by fifty feet, and Johnson and Burnett the remainder of said lots, and the trustees shall make one deed to the parties, describing the land and conveying to the parties according to their respective holdings.

Your office judgment is therefore thus modified.

PRIVATE LAND CLAIM—SURVEY—DECREE OF CONFIRMATION.

MARTINEZ ET AL. *v.* THE UNITED STATES.

The instructions for the survey of a confirmed private claim must follow in terms the decree of confirmation. The Department may determine on appeal whether such instructions are in conformity with the decree, but it can not review the action of the court in the matter of fixing the boundaries of said claim.

Secretary Smith to the Commissioner of the General Land Office, February 8, 1896. (J. I. H.) (W. M. B.)

Julian A. Martinez, *et al.* appeal from your office decision of June 7, 1894, and that of July 19, 1894, reaffirming said former decision in the case of said plaintiffs against The United States, wherein your said office, for reasons therein contained, refused to approve supplemental special instructions issued by the surveyor-general under contract No. 280, dated April 26, 1894, awarded to United States deputy surveyor Sherrard Coleman for the survey of the Arroyo Hondo land grant (reported No. 159, office docket United States court of private land claims, No. 5) situate in Taos County, Territory of New Mexico, as confirmed by decree of said court, sitting at Santa Fe, in and for said Territory.

The contracting deputy surveyor having reported to the surveyor-general, after an examination in the field as to the true locus of the boundary calls of this grant as given in the original instructions for the survey thereof, that it was impossible to make a survey of the granted land under said instructions, asked that supplemental special instruction be given in order that the said survey might be properly and correctly executed.

Upon drafting and submitting, by the surveyor-general, to your office, for approval, such instructions, your said office declined to approve the same, holding in referred to office decision of June 7, 1894—embodied in letter of same date to the surveyor-general—that:

It is clearly evident that the power to issue supplemental special instructions to deputy Coleman directing him to execute the survey of the Arroyo Hondo grant in any manner which is not in strict compliance with the decree of confirmation describing the boundaries of said grant does not lie with you or this office; consequently the supplemental special instructions issued by you to deputy Coleman, wherein he is directed in fact to execute said survey in direct contravention of the terms of the decree of confirmation, cannot be legally approved.

It is also apparent, from the terms of the act (March 3, 1891, 26 Stat. 358, section 10) referred to, that although the boundaries of the Arroyo Hondo claim are found to be erroneously described in the decree of confirmation, the power to correct said errors of description lies wholly with the court wherein the decision was rendered.

Plaintiffs assign as errors of your office in disapproving the said supplemental special instructions by the surveyor-general to Deputy Surveyor Coleman, as follows, to wit:

I. Because the said supplemental instructions were correct and described the boundaries of the said grant as given and set out in the decree of confirmation of the said grant.

II. Because the boundaries of the said grant as described and set out in the decree of confirmation were correct, and in exact compliance with the boundaries and calls given in the original *expediente* of the grant.

III. Because the said supplemental special instructions should have been approved, and the survey made in accordance therewith so that persons wishing to make objection might have done so, and then the plaintiffs would have had the opportunity to answer any objections before the court, as provided for by the act of Congress under which the court approved the grant.

IV. Because the Honorable Commissioner held that the original special instructions described the boundaries of the grant as they appear in the decree of confirmation, whereas they are incorrect, because they do not describe the boundaries as they are in the decree.

V. Because the United States court of private land claims fixed and designated the boundaries in the decree after full hearing of the case and testimony, and the Commissioner of the General Land Office has no power or authority to change the same after final decree of confirmation, as in this case.

The primal question which presents itself for consideration is: whether the referred to supplemental special instructions fail—"in any manner"—to conform to, or are "not in strict compliance with the decree of confirmation describing the boundaries of said grant", and wherein, if in any manner, the original special instructions approved by your office are in non-conformity therewith.

To reach that end it will be necessary at this place to set out the material or that portion of said decree respecting the boundaries, or more properly speaking the boundary calls, of the grant, which is in words following:

That the title and claim of said complainants and the other heirs, descendants and successors in interest and title to the original grantee Nerio Sisneros and the forty-four families with him in and to the following tract of land namely—a tract of land in said county of Taos bounded on the north by the land mark of the settler Pablo Cordova, and on the south by the mouth of cañon of the Arroyo Hondo and the land mark of Pablo Lucero, and on the east by the ridge of the mountain, and on the west with the brow of Arroyo Hondo, consisting of twenty-four thousand acres, be and the same is hereby established and confirmed in them, their heirs, successors and assigns forever.

The surveyor-general in his letter to Deputy Coleman, under date of May 25, 1894, embodying supplemental special instructions for survey of the grant in question, states:

It now appears from your communication dated May 22, 1894 (a copy of which is hereto attached), that from a personal examination in the field, and from testimony submitted to you in relation to the boundary calls of said grant, that you find it impossible to make a survey of the same according to the special (original) instructions issued on March 26, 1894, and you ask for new instructions for the survey of said grant.

In view of the fact that you do not find the boundary calls of said grant located as they were supposed to exist in the field at the time that the special (original) instructions of March 26, 1894 were issued for the survey of said grant, I therefore issue the following supplemental special instructions for your guidance in the execution of the survey of said grant, to wit:

It appears from your said communication and from the statement of boundaries, that the north boundary of this grant should be established through the "land mark

of the settler Pablo Cordova"; that the south boundary should be established at the mouth of the "Cañon of the Arroyo Hondo", and through the "land mark of Pablo Lucero"; that the east boundary should be established along the "ridge of the mountain;" and that the west boundary should be established along the "brow of the Arroyo Hondo."

You are therefore instructed in the execution of this survey to proceed to the "brow of the Arroyo Hondo" which is the west boundary call of said grant, and at a point on the south side of said arroyo you will establish the beginning and S. W. corner of the survey of said tract as directed in the manual of surveying instructions of 1890; thence in an easterly direction to the "land mark of Pablo Lucero"; thence in an easterly direction to a point in the "mouth of the Cañon of the Arroyo Hondo" on the south side thereof; thence in an easterly direction to the "ridge of the mountain", which is designated in the decree of approval and confirmation as the east boundary call of said grant, at which point you will establish the S. E. corner of said tract; thence in a northerly direction, following the "ridge of the mountain" to a point on a line in an easterly and westerly direction through the "land mark of Pablo Cordova", at which point you will establish the N. E. corner of said tract; thence in a westerly direction to the "land mark of Pablo Cordova"; thence in a westerly direction to the brow of the Arroyo Hondo, at which point you will establish the N. W. corner of said tract; thence in a southerly direction along the "brow of the Arroyo Hondo" to the place of beginning.

The decree of confirmation named five well known and definitely ascertained land marks, or boundary calls, of this grant, and designated no more, doubtless, for the reason that a greater number were not known to exist, or mentioned in the grant. Be that as it may, but still while it is true that the original special instructions, approved by your office for the survey of the grant, described these said land marks, or boundary calls precisely as they are described in the decree of the court, yet a very material and serious error was made in those instructions in fixing or locating the situs of the boundary call selected as the beginning or starting point in the proposed survey, as follows, to-wit:

You (deputy surveyor) are therefore instructed in the execution of this survey, to proceed to "the mouth of cañon of the Arroyo Hondo," which is one of the boundary calls, and which evidently means the mouth of the Arroyo Hondo, where the same empties into the Rio Grande del Norte, at which point you will establish the beginning of the survey of said tract by setting and marking the beginning and S. W. corner of said survey.

The court in its decree did not undertake to give the relative locations of the boundary calls, and for the original instructions to locate the boundary call, designed as the starting point in the survey, some miles distant east, from the real situs constituted an error sufficiently grave to render the survey made in accordance therewith defective and inaccurate, and which would necessarily cause the survey to embrace land not intended to go to the grantees. With respect to the locus of said boundary call appellants state that:

The impression has existed with some, and no doubt did with the surveyor-general when he gave his original special instructions, that the boundary call "the mouth of the cañon of the Arroyo Hondo" meant the junction of the Arroyo Hondo and the Rio Grande; this is an error as it (the point of confluence of the two above named streams) is some seven miles west from the point given as one (Pablo Lucero) of the

south boundary calls in the decree; and which appeared in evidence when the grant was confirmed.

By reference to the sketch map, or diagram, of the granted lands—hereto attached and marked exhibit “A”—it will be observed that “the mouth of the Cañon of the Arroyo Hondo” is situate upon the land included in the grant as confirmed by the court at a point indicated by the letter “B”, being several miles distant east—instead of west—of the other south boundary call described as Pablo Lucero, the relative position of which to the other south boundary call is indicated by the letter “C” upon the sketch map.

Notwithstanding the fact that the relative locations of the five boundary calls—the one to the other—does not appear in the decree of confirmation, still it is clear that the boundary call “the mouth of cañon of the Arroyo Hondo”, is not at the point of confluence of the Arroyo Hondo and the Rio Grande del Norte, but is at the point where the Arroyo Hondo comes out of the mountain at the western terminus or extremity of the cañon, and necessarily is where the said cañon ends and coincidentally terminates with the mountain, or the spur or foot hill thereof.

The court designated “the brow of the Arroyo Hondo”, which evidently means the brow of the Arroyo Hondo hill, as the western boundary call, and consequently the Rio Grande cannot be the western boundary of the grant, as seems to have been at first supposed by the surveyor-general as would appear from his original special instructions, since a portion of the Cañon de los Mestenos lay between the western boundary of the grant in question and the said river.

It appears that your office did not only refuse to sanction the execution of this survey under the supplemental instructions for the reason stated, but for the further reason of alleged error on the part of the court in describing the boundary calls of the grant, as evidenced by your office decision in the following words:

There appears to be no doubt that the boundaries of the grant as described in the decree, are erroneous and that the deputy cannot execute the survey of the grant under his instructions by reason of existing errors in the description of said boundaries.

It is also apparent, from the terms of the act (March 3, 1891,) referred to, that although the boundaries of the Arroyo Hondo claim are found to be erroneously described in the decree of confirmation, the power to correct said errors of description lies wholly with the court wherein the decision was rendered.

You are therefore instructed to notify Deputy Coleman to suspend further operations in the survey of the Arroyo Hondo grant under the special instructions originally issued to him under contract No. 280; and you will also notify the U. S. court of private land claims of the inability of the contracting deputy to execute said survey by reason of the erroneous description of the boundaries of said grant, as embodied in the decree of confirmation.

It is competent for your office to determine whether the special instruction issued for the survey of a land grant confirmed by the court of private land claims are in conformity with the decree of the court,

but your said office can no more review the action of that court for the purpose of declaring the same erroneous in any particular, than it can correct any supposed error therein.

There seems to be considerable controversy over the eastern boundary of the grant as fixed by the court, and it further appears from the record that the court was petitioned to reconsider its former action and change its finding—reached after two hearings had in the case—with respect to the location and description of this boundary call of the grant.

The record shows that at the April 1894 term, of the court wherein a final decision was rendered in the case—more than a year prior thereto—a motion, based upon allegations of error in the decree of confirmation relative to erroneous description of said boundary call, was made to set aside the said decree, and to reopen the case for the purpose of correcting the stated error, which motion was overruled after being fully argued on both sides, and all objections to the decree having been fully considered by the court, without disturbance of its previous action.

By reference to sketch map, exhibit “A”, it will be seen that the land mark “Pablo Cordova”—the north boundary call of the grant—is indicated thereon by the letter “A”; the land mark “the mouth of the Arroyo Hondo cañon—one of the south boundary calls—by the letter “B”; the land mark “Pablo Lucero”—the other south boundary call—by the letter “C”; “the ridge of the mountain”—the east boundary call—by the letter “D”; and the “brow of the Arroyo Hondo”—the west boundary call—by the letter “E”.

Now the locus of the said boundary calls, in each particular instance, as given or fixed in the original special instructions, was not in conformity with, or rather do not correspond to, the locus of said boundary calls as they were found to exist and located by the deputy surveyor from testimony taken in the field, and as the real situs thereof has herein been shown; but the supplemental special instructions are found to be in strict conformity therewith, and no way in contravention thereof, so far as I am able to understand the matter, and should have been approved.

Your office, as is shown by the record, was not advised at the time of its decision of June 7, 1894, that the attention of the court had already been called to the alleged errors which your office directed should be done, and that the court had considered the errors assigned and refusing to recede from its former action in such particular, reaffirmed its final or former decision, but your said office was informed as will appear from the evidence furnished by exhibit hereto attached marked “D” of the action of the court in the matter prior to your office decision of July 19, 1894, reaffirming its former decision.

This Department may, upon appeal to it, determine the question as to whether any specified instructions issued for the survey of a land grant confirmed by the court of private land claims are or are not in

conformity with the decree of confirmation, as has herein been done, but it cannot review the action of that court for the purpose of pronouncing the decree of said court erroneous in matters over which it has sole jurisdiction.

Upon the execution of the survey under consideration the court is authorized under provision contained in paragraphs two and three of section ten of the act of March 3, 1891, to consider and pass upon such objections as may be made to the survey, with power to correct any error that may appear therein as the result of any mistake of the court in locating and describing the boundary calls of the grant. It may sometimes happen, such a thing is possible, that the execution and return of the survey of a grant confirmed by the court, would furnish valuable evidences with respect to the boundary calls thereof which was not otherwise accessible to or obtainable by the court, in the light of which it could shape and govern its action in the final adjustment of such grant.

In view of the facts as they appear of record and above related, and the views herein expressed, I can reach no other conclusion than that the only alternative left your office, under the circumstances of the case, is to direct a survey to be made, at the earliest practicable moment, of this grant under the supplemental special instructions heretofore issued by the surveyor-general, or such special instructions as may be deemed advisable, provided they are in conformity with and not in contravention of the decree of confirmation, and it is so ordered.

The decisions of your office above referred to are hereby reversed.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

THOMPSON ET AL. *v.* GREGORY.

The validity of an entry is not affected by the fact that the preliminary affidavit is executed before the land is formally declared open to entry, where, prior thereto, the land in question was restored to the public domain by an act of Congress.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (F. W. C.)

I have considered the appeals filed on behalf of F. P. Thompson and Lars J. Klippen from your office decisions of March 13th and April 26th, 1895, denying their applications to contest the homestead entry of James F. Gregory, made February 23, 1891, covering the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 27, T. 49 N., R. 10 W., Ashland land district, Wisconsin.

This land is a part of that appertaining to the grant for the unconstructed portion of the Wisconsin Central Railroad, which was forfeited and restored to the public domain by the act of Congress approved September 29, 1890 (26 Stat., 496).

Under orders issued by your office, a published notice of the restoration was given, and entries were not accepted until February 23, 1891.

On that day Gregory made homestead entry as before stated.

Same day Klippen tendered homestead entry for part of the land included in Gregory's entry, alleging settlement thereon in May, 1890. This application was rejected for conflict with the entry by Gregory, and Klippen then filed a contest against Gregory's entry, alleging prior settlement, residence and improvements, and claiming a preferred right of entry under the second section of the forfeiture act.

Thompson on February 23, 1891, also applied to make entry of the land covered by Gregory's entry, which application was rejected for conflict, and on March 19th following he also filed a contest against Gregory's entry, alleging prior settlement.

Hearing was duly held upon these contests, and upon the record made the local officers recommended that they be dismissed.

Your office decision upon said contests sustained the recommendation of the local officers, and Thompson and Klippen appealed to this Department.

Said appeals were considered in departmental decision of May 21, 1894 (not reported), in which it was held that neither Thompson nor Klippen gained any rights superior to Gregory under their settlements and residence as alleged.

A motion was filed on behalf of Klippen for a review of said decision, but said motion was denied December 26, 1894.

From the record now before me it appears that on September 1, 1894, Thompson filed a second contest against Gregory's entry, alleging—

1. That said homestead entry is illegal for the reason that it is not founded upon a good and sufficient homestead affidavit, but upon an affidavit executed February 21, 1891, whereas the land described did not become subject to entry until February 23, 1891.

2. That said homestead entry was fraudulently allowed by the then register and receiver of the U. S. Land Office, acting in collusion with one Arthur Osborne, the business partner of said receiver.

3. That the said Gregory has since the allowance of his said homestead entry wholly failed to reside upon and cultivate the land embraced therein, and has for more than six months prior hereto failed to reside upon said land.

On January 8, 1895, Klippen also filed a second contest against Gregory's entry, alleging—

That he has known said land since May 10th, 1890; that he has been on said land making the same his home ever since May 10th, 1890, and often inspected each of its legal subdivisions, and personally knows that neither the homestead claimant, James T. Gregory, nor any other person has a legal residence, or settlement, on said tract, except himself. And affiant further says on personal knowledge, that the sworn statements of said James T. Gregory and his witnesses at his said final proof, as to residence or settlement of said James T. Gregory, on said tract of land at any time since May 10th, 1890, are in all essential particulars false and untrue, and said final proof is fraudulent.

These applications to contest were considered in your office letter of March 13, 1895, and denied.

In denying that filed by Thompson, it was held that the first ground of contest, viz., that attacking the validity of Gregory's homestead affidavit, will not be investigated because in departmental decision of December 26, 1894, denying a motion filed for the review of departmental decision in the case of *La Chapelle v. Ross*, the same question was considered and similar affidavit to that made by Gregory was held to be good.

In the decision referred to, which was not reported, it was held on the authority of the decision in the case of *McKernan v. Baily* (17 L. D., 494), that land having a like status to that here involved, was restored to the public domain by the passage of the act of September 29, 1890 (*supra*), and that any affidavit executed subsequently to that date must be held to be valid.

The land was therefore held not to be in the same condition as that involved in the case of *Smith v. Malone* (18 L. D., 482), and for that reason the ruling made in the last named case was held not to apply. To this extent your office decision is affirmed.

The reason assigned for denying the application upon the second and third grounds, is that—

Thompson's allegations are corroborated upon actual knowledge as to the charge relative to the entryman's homestead affidavit, and upon information and belief as to the other charges. . . . The allegations in Thompson's contest affidavit based upon information and belief, are not sufficiently alleged to warrant an investigation. *Patterson v. Massey* (16 L. D., 391).

The corroborating affidavit accompanying Thompson's affidavit of contest is as follows:

Personally appeared before me Alden R. Batson and John O'Reilly, who being duly sworn depose and say, each for himself, that he has read the foregoing affidavit of Frank P. Thompson, that he is well acquainted with the facts therein stated, with respect to the date of the execution of said James T. Gregory's homestead affidavit, and with respect to his failure to reside upon the land claimed by him as a homestead, and know them to be true; and that as to these averments made upon information and belief concerning the collusion between R. C. Heydlauff and Arthur Osborne they are true to the best of his information and belief.

It will thus be seen that the charge of abandonment was duly corroborated.

After this contest had been filed Gregory offered proof, against the acceptance of which Thompson protested and asked for a hearing upon his contest filed in September, 1894.

This was forwarded to your office, together with the contest affidavit, without action, the local officers believing it was questionable whether the receiver was qualified to take action in the matter, inasmuch as the defendant is one of the receiver's official bondsmen.

Your office letter "A" of January 9, 1895, advised the local officers that the receiver was not disqualified, and instead of returning the

affidavit of contest for proper action it was considered by your office in connection with a prior application made by Thompson to enter this land.

It is clear that the case between these parties before considered by this Department in nowise involved Gregory's compliance with law.

In the affidavit filed by Thompson in September, 1894, it is charged that Gregory had wholly failed to reside upon and cultivate the land, and had, for more than six months prior thereto, failed to reside thereon, and in the affidavit filed by Klippen, it is further charged that Gregory's final proof is false, untrue and fraudulent.

The affidavit of contest filed by Thompson on September 1, 1894, seems to contain a sufficient charge of abandonment to warrant the ordering of a hearing thereon, and your office decision denying the same is reversed, and the papers herewith returned, and you will instruct the local officers to issue notice under Thompson's contest upon the charge of abandonment and proceed with the same as in other cases made and provided. Action upon the charges contained in the affidavit filed by Klippen will be suspended to await the result of Thompson's contest.

PRACTICE—RULE TO SHOW CAUSE—BURDEN OF PROOF—COSTS.

WEBB v. DAVIS.

Where an intervening entryman is called upon to show cause why his entry should not be canceled, and the right of a prior adverse claimant under a homestead declaratory statement recognized, the burden of proof is upon said entryman, and the costs in such proceeding should be taxed in accordance with rule 55 of practice.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (C. J. W.)

October 17, 1893, Jeremiah Webb filed homestead declaratory statement No. 128 for NW. $\frac{1}{4}$ of Sec. 31, T. 20 N., R. 3 W., I. M.

October 25, 1893, John F. Davis made homestead entry No. 2855 for the same land.

November 6, 1893, Robert J. Webb applied to make a homestead entry under his said filing No. 128. His application was accompanied by the usual affidavits and one in addition thereto in which he explained the apparent difference in the name in which the filing was made, and the one in which the application was made, and showing that they meant the same person.

On January 8, 1894, the register issued notice to Davis requiring him to appear and show cause why his entry should not be canceled, and that of Webb be allowed. At the time designated the parties appeared and Davis on his motion, was made a party defendant.

Webb submitted testimony on the subject of his settlement on, and improvement of, the land, on the first day, and closed.

On the following day he was required before the case proceeded, to deposit fifteen dollars to defray the costs of taking further testimony. Webb declared himself unable to make the deposit at that time, whereupon Davis moved the dismissal of the case for want of prosecution, which motion was sustained. Webb appealed, and on September 20, 1894, your office affirmed said decision.

On November 1, 1894, Webb appealed from your office decision alleging error in holding that he was a party plaintiff and bound for the costs of Davis' testimony, and in holding that he (Webb) had not shown that he was the same person who made the soldier's declaratory statement.

The affidavit of Webb explanatory of the apparent discrepancy in the names in which the filing, and the application to enter were made, shows that Webb, who makes this application, is the soldier and identical person who filled the declaratory statement. This affidavit is *prima facie* true; completes the record, and entitled Webb to make entry unless Davis contests the truth of his showing. Davis was called upon to show cause why his entry should not be canceled and Webb allowed to transmute his filing to a homestead entry. The burden was upon Davis to show some fact which would defeat Webb's right to enter, and he would necessarily occupy the position of a plaintiff in making such showing. It was error to require Webb to deposit money to pay for taking further testimony, especially when he was not offering or asking for further testimony. If the hearing had proceeded, the costs of further testimony should have been taxed in accordance with rule No. 55 of practice. The record as it stands makes a *prima facie* case in favor of Webb, which requires the cancellation of Davis' homestead entry, and that Webb be allowed to make entry, unless Davis shows affirmatively some lawful reason why he should not be so allowed.

Your office decision is reversed and the case remanded for further hearing, and Davis is allowed thirty days from notice of this decision within which to introduce testimony if he desires to do so at his own cost, and failing to do so, his entry will be canceled and Webb's application allowed.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT—EQUITABLE ACTION.

MICHAEL LEAHY.

The preliminary affidavit (form 4—102 b) should be executed within the district in which the land is situated; but where not so made, an entry may be equitably confirmed for the benefit of a purchaser whose good faith is apparent.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (C. W. P.)

The land involved herein is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 17, T. 28 N., R. 27 E., Waterville land district, Washington.

It appears that, by your office letter, dated June 20, 1894, the pre-emption cash entry, No. 475, made on January 21, 1893, by Michael Leahy for said land, was suspended, and preliminary affidavit (form 4—102 b) required, and that on July 14, 1894, the local officers transmitted the affidavit of Dennis J. Leahy to the effect that he had purchased the claim of Michael Leahy, who had left the country, and was now residing in Kilrain, Province of Quebec, Canada. In his affidavit it is stated that he had known Michael Leahy for twenty-seven years past, and knew that, previous to making proof, he had not filed for or entered upon, any tract which, with that covered by his pre-emption entry, would make more than three hundred and twenty acres, and he asks that his affidavit, thus presented, may be accepted as a compliance with the requirements of your office.

By your office letter of August 14, 1894, you refused to accept the affidavit of Dennis J. Leahy in these words:—

You are advised that the affidavit in question cannot be subscribed to outside of the land district in which the land is situated (William K. Short, 18 L. D., 232), nor does authority exist for accepting such, made by a party other than the claimant himself.

Therefore you are directed to notify the claimant that he is hereby allowed sixty days within which to furnish the affidavit taken in the Waterville district. In default of compliance herewith the entry will be cancelled.

Michael and Dennis J. Leahy appealed to the Department, and with their appeal filed an affidavit (form 4—102 b) executed by Michael Leahy before a notary public at the village of Huntingdon in the county of Huntingdon, in the province of Quebec and the Dominion of Canada.

This affidavit can not be received because made outside of the land district in which the land is situated (William K. Short, *supra*); but in the absence of any adverse claim, if the proof of the purchase and of the good faith of the purchaser be satisfactory, I think the entry should be referred to the board of equitable adjudication (Charles Lehman, 8 L. D., 486).

The decision of your office is modified accordingly.

OKLAHOMA TOWN LOTS—EVIDENCE OF OCCUPANCY.

JOHN C. ROWLAND.

A duly verified and recorded application for the registration of a town lot claim, wherein occupancy and improvement are alleged, constitutes such "paper evidence" of occupancy as the statute contemplates, and may be accepted for such purpose, in the absence of any adverse claim or protest.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (E. E. W.)

On the 8th of November, 1893, John C. Rowland, above named, applied for deed to lot 11, of block 20, in Enid, Oklahoma. His application was rejected by the trustees, one of them dissenting in his favor,

and he appealed to the Commissioner. On the 16th of November, 1894, the Commissioner affirmed the decision of the trustees, and the applicant appealed to the Secretary.

The record shows that on the 19th of September, 1893, J. N. Turner filed with the recorder of deeds for the county a verified application for registration of claim to the lot, and that the same was recorded. In this application Turner alleged that he made settlement on the lot on the 16th of September, 1893, which was the opening day of that part of the Territory; that he had made good and substantial improvements on the lot, and resided on it continuously since making settlement.

The townsite entry was made on the 11th of October, 1893.

Sixteen days later, the 27th of October, 1893, Turner assigned his right to the lot to Newton Burwell, and on the 8th of November, 1893, Burwell assigned to Rowland. These assignments were in writing on the said application for registration.

In his application for deed Rowland alleges Turner's registration of settlement and claim, the assignments aforesaid, and also that he had taken possession and then occupied the lot.

In the Commissioner's decision he says:

After carefully considering this case I must conclude that the occupancy of Turner was not such as is contemplated by the townsite law. He made affidavit that he resided on the lot from November 16 to 19, 1893, but there is nothing to show that he was occupying the lot at the date of townsite entry. . . . The "papers" filed cannot be accepted as sufficient evidence of "possession under claim of ownership," as contended. The . . . decision of (the trustees) is affirmed, and Rowland's application is rejected.

It is provided in section 2 of the act of Congress of May 14, 1890 (26 Stat., 109), that

any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any townsite . . . shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder.

Turner's application for registration of his claim, alleging settlement, improvement and occupancy, having been recorded in the office of the recorder of deeds, it constitutes such paper evidence as is contemplated by this statute, and as there is no adverse claim, and no protest from the town of Enid, it must be accepted as evidence of his occupancy at the date of the townsite entry. His assignment to Burwell was not made until after the townsite entry.

The decision of the Commissioner of the General Land Office is reversed, and the trustees will be directed to make deed to the applicant.

RAILROAD LAND—SECTION 3, ACT OF SEPTEMBER 29, 1890.

MOORE v. MCGUIRE.

One claiming the status of a licensee on railroad land, by virtue of settlement thereon under circular invitation of the company, must show that he has made application to the company for the right of occupancy or purchase.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 8, 1896. (F. W. C.)

I have considered a petition filed on behalf of Edwin Moore for reconsideration of departmental decision of November 5, 1895 (21 L. D., 392), in the case of Edwin Moore v. Philip McGuire, involving the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 33, T. 14 S., R. 7 E., San Francisco land district, California, in which departmental decision of October 20, 1893, in said case was recalled and vacated and your office decision denying to Moore the right to purchase said land under the provisions of section 3, of the act of September 29, 1890 (26 Stat., 496), was affirmed.

This petition is in the nature of a motion for re-review.

Under the authority of the decision of this Department in the case of Eastman v. Wiseman (18 L. D., 337), your office decision of October 20, 1893, denying Moore's claimed right of purchase, was reversed by departmental decision of June 1, 1895 (not reported).

For the review of said decision a motion was filed on behalf of McGuire, and in departmental decision of November 5, 1895 (*supra*), the decision of October 20, 1893, was recalled, as before stated, for the reason that it was shown that Moore did not apply to the company until July 22, 1889.

The third section of the act of September 29, 1890 (*supra*), grants the right to purchase any of the lands forfeited by the first section of said act, to qualified persons who

are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight.

In the case of James C. Daly, on review (18 L. D., 571), it was said:

The Department has held, in the case of Eastman v. Wiseman (18 L. D., 337—syllabus), that the provisions of said section three "extend to one who takes possession of and improves lands under the circular invitation of the company, and in accordance with said circular applies to purchase said lands of the company." But Daly does not show, as was shown in the case cited, that he ever applied to purchase the land now in question. In that case the applicant received a postal card informing him that his application had been received, stating (*inter alia*) that *bona fide* settlement, or improvement of such character as would be evidence of his intention to purchase, was necessary before any right by virtue of his application could be obtained; and this postal card was held to be, by implication, a license to take possession of the land.

It was upon this construction that it was held that Moore was not entitled to purchase under the 3rd section of the act of September 29, 1890 (*supra*), because he did not apply to the company until after January 1, 1888.

In the petition now under consideration it is urged that—

The Daly decision and the *Eastman v. Wiseman* decisions are undoubtedly correct holdings under the requirements of the Northern Pacific Railroad circulars, and a license could not exist there without written notice of settlement to the railroad company. They were required to file this notice and to agree to enter into a contract to purchase within ninety days from notice from the company that the price was fixed. See *Eastman v. Wiseman* (18 L. D., 339) where the N. P. R. R. Co., circular is set out and the Secretary's holding at bottom of page 340 that such filing was imperative.

We respectfully suggest no such requirements were made by the Southern Pacific Railroad Company and hence we say and suggest that where the circulars and requirements are so entirely different in their conditions and where the Southern Pacific Railroad Company's circular of invitation and instructions contained no such imperative requirement, is it, we suggest, correct to decide applications under Southern Pacific's claimed licenses under Northern Pacific Railroad Company's requirements? Each had its circular. Each its requirements; and as to what constitutes the license of each railroad, should, we suggest, be governed by local circulars, invitations, surroundings and decisions of tribunals where the matter has been passed upon.

Accompanying the petition is a copy of the circular issued by the Southern Pacific R. R. Co., dated June 1, 1877.

The 4th and 5th sections of said circular read as follows:

Sec. 4. Settlement before Patent.—The company invites settlers to go on the lands before patents are issued or the road is completed; and intends, in such cases, to sell to them in preference to any other applicants, and at prices based upon the value of the land without the improvements put upon it by the settlers. It makes no definite contract with any individual upon this basis, but it treats all fairly. It will not sell to somebody else, merely because the latter offers a higher price. It will not sell to any one land that may be required by it for railroad purposes, such as places for depots, stations, etc., or for town sites.

Sec. 5. Land Policy of Company.—The policy of the company has always been, and is now, to encourage the settlement of its lands in small tracts, by persons who will live on and cultivate them. To this end settlers are invited to make applications to buy and to occupy and put to use the vacant lands until such time as they shall be ready for sale. If the settler desired to buy, the company gives him the first privilege of purchase at the fixed price, which, in every case, shall only be the value of the land, without regard to the improvements. It must be understood that the application of a speculator, or of a person who does not improve or occupy the land, will not, although received first, take precedence or priority of that of the settler whose application may, perhaps, be filed last of all. The actual settler, in good faith, will be preferred always, and the land will be sold to him as against every other applicant. The company also wishes it to be known that a mere application to buy land, unaccompanied by actual improvement or settlement, confers no right or privilege which should prevent an actual settler from taking it, if vacant, into possession, and cultivating and improving it.

When there are two or more applicants for the same tract of land, an adjudication of their respective claims will be made by the land agent, upon due notice given to the parties, and the right to buy, at the graded price, will be awarded to the applicant who shall be deemed to have the most equitable claim.

It is very plain to me that an application is contemplated by this circular where the party desires to occupy or buy of the company.

Without such application the company would have no means of knowing the exact tracts desired or claimed by each particular settler.

From a review of the matter I can see no good reason to reconsider departmental decision of November 5, 1895, and the same is adhered to and the petition, which is herewith enclosed for the files of your office, is denied.

TOWNSITE ENTRIES IN ALASKA.

ORDER.

Amending Paragraph 24, Regulations of June 3, 1891.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 6, 1895.

It is hereby ordered that paragraph 24 of Regulations of June 3, 1891, 12 L. D., 583, to carry into effect certain provisions for allowing townsite entries in Alaska be and the same is hereby amended by striking out the words "the governor, judge of the district court, and marshall of the Territory of Alaska are constituted a board and it is hereby made a part of their official duties," in the tenth, eleventh and twelfth lines thereof, and inserting in lieu thereof the words "such employe or employes of the Government as shall be designated or detailed for that purpose shall constitute a board whose duty it shall be," so that said paragraph, when so amended, shall read as follows to wit:

24. The fee-simple title to certain real estate in the towns of Sitka and Kodiak was conferred under Russian rule upon certain individuals and the Greek Oriental Church, and confirmed by the treaty concluded March 30, 1867, between the United States and the Emperor of Russia (15 Stat. at Large, 530); other real property is now held and occupied by the United States in several of the Alaska towns for school and other public purposes; while it is perhaps desirable that still other lots or blocks in those towns that take advantage of the provisions of said act, should be reserved to meet the future requirements for school purposes, or as sites for Government buildings; therefore, such employe or employes of the Government as shall be designated or detailed for that purpose shall constitute a board whose duty it shall be, as soon as notified by the United States marshal that the duplicate receipt for the money deposited to defray the costs of a special survey of the exterior lines of such town site has been received by him, to go upon the land applied for and inquire into the title to the several private claims held therein under Russian conveyances, and to fix and determine the proper metes and bounds of the same, as originally granted and claimed at the date of our acquisition of said Territory. Such board will duly notify the present owners of said private claims both of their right to submit testimony and documents, either in person or by attorney, in support of their several claims and of their right, within thirty days from receipt of notice of the conclusions of said board, to file an appeal therefrom, with said board, for transmission to this office. Should any one of such parties be dissatisfied with the decision

of this office in such a case, he may still further prosecute an appeal to the Secretary of the Interior upon such terms as shall be prescribed in each individual case. Proper evidence of notice should be taken by said board in all cases, and a record of all testimony submitted to them should be kept. If an appeal is taken, the same, together with the decision of the board and all papers and evidence affecting the claims of the appellant, should be forwarded direct to this office. Should no appeal be taken, the report of the board should be filed with the United States marshal, ex officio surveyor-general, for his use and guidance, as hereinafter directed.

It shall also be the official duty of said board to approximately fix and determine the metes and bounds of all lots and blocks in any such town site now occupied by the Government for school or other public purposes, and of all unclaimed lots or blocks, which, in their judgment, should be reserved for school or any other purpose; and to make report of such investigations to the ex officio surveyor-general, for his use and guidance, as also hereinafter directed, should no appeal be filed therefrom.

Should an appeal from the action or decision of such board be filed in any case, no further action will be taken by the ex officio surveyor-general until the matter has been finally decided by this office or the Department. But, should no appeal be filed, the ex officio surveyor-general will proceed to direct the survey of the outboundaries of the town site to be made, the same in all respects as above directed in the survey of land for trade and manufacturing purposes, except that he will accept the report and recommendations made by said board and exclude and except, by metes and bounds, from the land so surveyed, all the lots and blocks for any purpose recommended to be accepted by said board. The execution of the survey of the lots and blocks thus excepted, shall be made a part of the duties of the surveyor who is deputized to survey the exterior lines of the town site; the survey of such lots or blocks shall be connected by course and distance with a corner of the town-site survey, and also fully described in the field-notes of said survey and protracted upon the plat of said town site; and the limits of such lots or blocks will be permanently marked upon the ground in such manner as the ex officio surveyor-general shall direct. In forwarding the plat and field-notes of the survey of any town site for the approval of this office, the ex officio surveyor-general will also forward any report that said board may have filed with him, for approval in like manner.

EDWD A. BOWERS,
Acting Commissioner.

Approved, February 17, 1896.

HOKE SMITH,
Secretary.

PRACTICE—DISPOSITION OF APPEALS—CURRENT BUSINESS.

SPECIAL ORDER.

Secretary Smith to the Commissioner of the General Land Office, January 29, 1896.

You are hereby instructed to transmit for disposition as current work all cases falling within the several classes specified herein:

1. All appeals allowed from orders granting or refusing hearings.
2. Appeals from the denial of the right of contest, or involving a matter of practice, where the appeal is from action taken prior to the hearing in a contest case.

3. Appeals involving a claimed right of way, either under the act of March 3, 1875, or March 3, 1891, granting right of way for railroads, canals, and reservoirs.

4. All cases where the matter in controversy has before been the subject of decision by the Secretary of the Interior and is again before the Department upon proceedings had in accordance with directions given in the prior decision, or where the same general charge is made against an entry that was adjudicated in a prior decision involving said entry.

5. Matters involving the adjustment of railroad grants arising under the act of March 3, 1887.

Nothing herein shall be taken as extending, or limiting, the right of appeal from your office as now recognized, the sole purpose of these directions being to expedite the disposition of certain work before the Department.

Please give due publicity to these instructions.

OKLAHOMA LANDS—TOWN LOT—POSSESSION.

YOUNG v. SEVERY ET AL.

One who enters the Territory in the prosecution of his business (traveling salesman) during the inhibited period, and does not seek to acquire an advantage thereby over other applicants for land, and in fact secures no such advantage, is not disqualified to acquire title to land in said Territory.

The possession of a town lot by a tenant is the possession of his lessor, and entitles the assignee of such lessor to a deed.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (J. I. H.) (C. W. P.)

The property involved herein is lots 14, 15, 16, 17, and 18, block 83, in El Reno, Oklahoma Territory, and the case comes before the Department on the appeal of C. L. Severy, from the decision of your office of April 29, 1895.

Two members of the townsite board found for Severy, and one member held that

Eddie C. Young and C. L. Severy, assignee of S. W. Sawyer, as contestee, having each failed to establish a legal claim of occupancy of lots 14, 15, 16, 17, and 18, in block 83, they cannot be considered as beneficiaries of the trust, and the said lots should have been ordered reported to the Secretary of the Interior for sale for the benefit of the municipal government of the city of El Reno, or for such other disposition under section 4 of the act of May 14, 1890, as the Secretary may direct.

Eddie C. Young appealed. Your office reversed the judgement of the townsite board, and awarded the lots to Eddie C. Young.

All the evidence necessary to recite is as follows:

In April, 1890, S. W. Sawyer purchased the lots in controversy from the Rock Island Railroad Company, and received certificates or contracts from the Oklahoma Homestead and Town Company. Immediately thereafter he placed valuable and permanent improvements on

the lots, and occupied them as a lumber yard until about October 1, 1891. On August 4, 1891, John A. Foreman and wife executed and delivered to Sawyer a warranty deed for the lots. In October, 1891, Sawyer leased the lots, with the improvements thereon, to Seawell, Waggoner and Benton, and sold to them his stock of lumber, they to continue in business upon the lots under the lease. A few days thereafter this firm was merged into the E. C. Young Lumber Company, of which Eddie C. Young was a member, who, while in possession of said lots under the lease, appeared before the board as an applicant for title, on the ground of possession and occupancy.

Young, or his firm, appears to have placed some slight improvements on the lots, while in possession under the lease from Sawyer.

The townsite of El Reno was entered on May 23, 1892.

In July, 1892, Sawyer made an assignment of these lots, with other property, to C. L. Severy, for the benefit of his creditors. Severy claimed deed under this assignment.

Sawyer appears to have been in Oklahoma Territory during the prohibited period.

Asa Jones, for Young, swore that he met him in the forepart of April, 1889, at Oklahoma Station, and that Sawyer told him that he was an advance agent for a townsite company, whose headquarters were at Arkansas City; that Dr. Rogers, who represented the same company, was with him; that he (Jones) wrote a contract for him and Rogers for land adjoining what was supposed would be Oklahoma City; that the contract was with George Severy and William Stevens. Henry S. Summers testified that he saw Sawyer at Oklahoma Station in March, 1889, in company with Dr. Rogers, and that he supposed they were looking for a townsite; that he understood Sawyer was there in the interest of some lumber business; that he did not know of any scheme or proposition of Sawyer or Rogers to obtain control of lands for townsite purposes. S. H. Radebaugh testified that he saw Sawyer at Oklahoma Station in the forepart of March, 1889; that he stayed at his (Radebaugh's) hotel twice; that Dr. Rogers was with him; that Dr. Rogers said he was looking up townsites, and to the best of his recollection Sawyer was a lumber man, or claimed to be one. T. M. Echelberger testified that he met Sawyer at Oklahoma Station in the forepart of March, 1889; that Sawyer said "we" were looking for a place to locate a townsite. E. C. Hamil testified that he saw Sawyer at Oklahoma Station, and at Guthrie a week or so before the opening; he was there with Dr. Rogers trying to get land to start a town. George Robinson testified that he saw Sawyer at Oklahoma Station a few days before the opening. Joseph Blackburn testified that he saw Sawyer at Oklahoma Station in the forepart of March, 1889; that Sawyer told him he was a lumber man from Lawrence, Kansas, he believes, and was in the lumber business at that place. Frank Wolf testified, that he saw Sawyer in Oklahoma Territory during the prohibited period.

Sawyer, in his testimony, admits that he was in the Oklahoma Territory at Oklahoma Station and at Guthrie, in March, 1889, on his way to Texas, in furtherance of his business of buying and selling lumber, and that he was looking at the country. He swore that he tried to sell lumber at Oklahoma Station and at Guthrie while there, but was unsuccessful,—that “he was not in luck.” He said he was also at Purcell. But he denied that he selected or attempted to select land for townsite or other purposes. There is no evidence that Sawyer ever made any examination of these lots, or had been upon them or within twenty-five miles of them previous to the opening. He bought them from the Rock Island Railroad Company in April, 1890,—a year after the opening.

With the exception of the testimony of Asa Jones, the evidence that Sawyer was looking for land for a townsite or for any other purpose is of the most vague and inconclusive character. And there is not a tittle of evidence that he used any information he may have acquired during his presence in Oklahoma Territory to his own advantage, or that he obtained any advantage over other persons seeking land in the Territory. Was he then disqualified to acquire title to land in the Territory? I think not.

It is said in the case of the *Townsite of Kingfisher v. Wood* (11 L. D., 330):

I do not think it was the intention of Congress, that a man who happened to be legally in the Territory, but did not use his position to his own advantage, or to the disadvantage of his fellow citizens, should be forever prohibited from acquiring any rights in the territory. [It is then said] Each case must be determined on its own merits and evidence; but it may be said generally that the presence in the territory before the opening, under the proclamation, and the actual settlement and entry at the land office must be so widely and obviously separated in every detail as to render it impossible to reasonably conclude that the one was the result of the other, or in anywise dependent upon it.

In the recent case of *Curnutt v. Jones* (21 L. D., 40), it is said:

If the broad doctrine of *Laughlin v. Martin*, *supra*, that one who knowingly entered the territory prior to the hour of opening becomes by such entry disqualified as a homesteader, is to be rigidly followed, there is no escape from the conclusion that James E. Jones, the defendant in the case at bar, is within the inhibition, and is, therefore, precluded as an entryman.

I am inclined, however, to the less procrustean and more liberal view that the circumstances of each case, albeit there may have been a premature entry, should control its decision.

And the passage last above cited from the case of the *Townsite of Kingfisher v. Wood* is quoted with approval, and it is said:

That is, but a different statement of the doctrine for a long time adhered to that one is disqualified who gains an advantage by entering the territory himself, or through an agent, or who enters for the purpose of gaining an advantage though none may result therefrom, the cases all appearing to turn upon the question of advantage, *vel non*.

In the case of *Sullivan v. McPeck* (17 L. D., 402), the defendant was in the Territory during the first half of the month of March, 1889, and

while he was outside at the moment of the opening, the testimony disclosed circumstances which justified the inference that the land subsequently entered had been selected by himself or an agent, and the route to the same adopted. It was concluded, therefore, that he had taken advantage of his previous sojourn in the Territory, and was, accordingly, held disqualified.

In *Dean v. Simmons* (17 L. D., 526) the evidence showed that Simmons "was within the Territory of Oklahoma in the month of March, and the forepart of April, 1889, and engaged in examining and selecting tracts of land" suitable for homesteads. It appeared, however, that when he had been made aware of the provisions of the act opening the lands to settlement, and of the pursuant executive proclamation, he went outside the Territory and there remained until 12 o'clock, noon, April 22, 1889; but it also appeared that the land settled on by him, and then in contest was the identical land or in the immediate vicinity thereof, upon which he had previously encamped. Upon these facts, though Simmons' good faith was not impugned, he was held to have been advantaged by his unlawful presence in the Territory, and his entry was, therefore, canceled.

These cases are both cited in the case of *Curnutt v. Jones*, without criticism, and, I think, were correctly decided.

It admits of no doubt that Eddie C. Young and his copartners were occupying the lots as tenants of Sawyer, at the time of the townsite entry; and their possession was the possession of Sawyer, their lessor. (*Ricks v. Reed*, 19 Cal., 531; *Rector v. Gibbon*, 11 U. S. R., 276; *Willison v. Watkins*, 3 Peters, 43.)

I am, therefore, of opinion that C. L. Severy, assignee of S. W. Sawyer, is entitled to deed, and your office decision is reversed.

HOMESTEAD—FINAL PROOF—CITIZENSHIP—WIDOW.

VIDAL v. BENNIS.

There is no statutory authority under which an administrator may submit final homestead proof.

A homestead entry made by one who is not a citizen of the United States, and has not at such time declared his intention of becoming a citizen, is not void, but voidable, and his subsequent declaration of intention, made prior to the intervention of an adverse claim, cures the defect.

As between two claimants, each asserting the right to perfect a homestead entry as the widow of a deceased homesteader, the Department, in the absence of a judicial determination of the legal status of the parties, will recognize the one who made her home on the land with the entryman, and who was married to him in the belief that his former wife was not then living.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 25, T. 17 S., R. 1 W., Los Angeles land district, California.

The record shows that May 5, 1885, Spiro Bennis made homestead entry for the above described tract.

November 26, 1892, Marco Bennis, as administrator of the estate of Spiro Bennis, deceased, submitted final proof showing that the entryman died on August 12, 1892, after having lived on the land since 1884 with his family, and that the improvements amounted to \$1,500.

January 6, 1893, the local officers rejected the said final proof for failure to furnish evidence of citizenship, and also because there is no statutory authority under which an administrator may submit final proof and perfect title to the claim of a deceased homesteader.

Prior to this time, on December 21, 1892, Pedro Vidal filed his affidavit of contest against the above described entry alleging that the entryman had not declared, at the time of making entry, his intention of becoming a citizen of the United States, and was not such at the time of his death.

The case being before your office upon appeal by the administrator from the rejection of his final proof, on the 11th of March, 1893; your decision was rendered wherein, amongst other things, it was held that the proof showed that Spiro Bennis was, at the time of his death, a citizen of the United States, and you therefore directed the dismissal of the contest of Vidal; and further held that, whilst the action of the local officers was not in error in recommending the rejection of the final proof of the administrator, as such, that nevertheless the proof could be accepted, by the widow filing her final affidavit.

The case as it stands before the Department, raises the question of the effect of an entry made by one who was not at the time of making entry, a citizen of the United States, and who at that time had not declared his intention of becoming so, but who did make such declaration prior to the intervention of adverse rights, to wit, on August 19, 1887. Is such an entry void? I do not think so.

The declaration of intention was made long prior to the time of the attachment of adverse rights, and the case is therefore similar in principle to one where residence was not established within six months, but where the contest would fail were it shown that it was filed long afterwards and where the laches had been cured. I therefore hold that the failure to make the declaration of intention prior to the making of homestead entry, did not cause the entry to be void but simply voidable, and no one having suffered by reason of such failure upon the part of the entryman, the defect was cured.

This is in line with *Ole O. Krogstad* (4 L. D., 564), where it was held, syllabus:

An alien having made homestead entry and subsequently filed his intention to become a citizen, it is held that in the absence of an adverse claim the alienage at time of entry will not defeat the right of purchase under the act of June 15, 1880.

In construing section 2319 of the Revised Statutes, which sets forth that the mineral lands were open to "exploration and purchase by citi-

zens of the United States and those who have declared their intention to become such," the court said:

Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands. *Cresus Co. v. Colorado Co.* (19 Fed. Rep., 78).

Not only is the entry merely voidable by the failure to make a declaration of intention to become a citizen, but the declaration when made relates back to the time at which it was sought to initiate rights to the public lands. *Jacob H. Edens* (7 L. D., 229).

It thus follows that the contest was properly dismissed.

It further appears from the record that there are two claimants before the Department claiming the right to submit final proof, as the widow of Spiro Bennis: Margaret Bennis of New York city, and Jane Bennis of San Diego county, California. The latter sets forth that she was married on the 31st of May, 1890, and that she continued to live with the entryman, Bennis, up to the time of his death on the 12th day of August, 1892; that prior to 1871, while in the city of New York, Spiro Bennis was married to Margaret Bennis; that in that year he removed to California and his wife refused to accompany him; that he had not seen his former wife for over twenty years, and at the time of his death had not heard from her for seventeen years and believed her to be dead; that this statement was made by her husband after he had been informed by the attending physician that he was about to die, and about twelve hours prior to his death. Further, that this was the first intimation she had that there was any doubt of the death of the former wife.

In your office decision it was assumed that Margaret Bennis was the widow of the entryman within the meaning of the law, and it was held that the proof of the administrator could be accepted in her behalf by her making the final affidavit in such cases provided.

I cannot concur in this view of the law.

Section 61 of the California Civil Code is as follows:

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved;
2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

Instances where such subsequent marriages have been held to be valid are numerous: *Eubanks v. Banks* (34 Ga., 407); *Strode v. Strode* (3 Bush., 227); *Kelley v. Drew* (12 Allen, 107); *Yates v. Houston* (3 Tex., 433); *Dixon v. People* (18 Mich., 84); *Cropley v. McKinney* (10 Barb., 47); *White v. Lowe* (1 Redf., 376), and *Canady v. George* (6 Rich., Eq. 103).

Without therefore undertaking to finally pass upon that question, as it does not come within the jurisdiction of the Department, it is sufficient to say that the natural equity is towards the woman who has resided on the land and had by her labor and economy, assisted in the reclamation of this tract from its natural state and materially aided in the making of a home. Following the language of the statute, therefore, the marriage of Jane Bennis will be recognized "until its nullity is adjudged by a competent tribunal."

The proof submitted by Jane Bennis, now in the record, is returned to your office for such action as may be deemed proper in consideration of the views herein expressed. The final proof submitted by Marco Bennis, administrator, is rejected as without authority of law for its submission.

The motion contained in the record for the dismissal of the appeal of Jane Bennis has not been considered on its merits, as the Department will not allow its rules to stand in the way of substantial justice being administered. *Knight v. United States Land Association* (142 U. S., 161).

Whatever rights Margaret Bennis may have can be best decided in the courts. The decision appealed from is accordingly reversed.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

COOPER v. SCHERRER.

The right of purchase under section 3, act of September 29, 1890, can not be exercised if not asserted within the statutory period.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (W. F. M.)

On February 24, 1894, Markus Scherrer made homestead entry of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 21, township 1 N., range 13 E., within the land district of The Dalles, Oregon.

On April 18, 1894, John L. Cooper filed an affidavit of contest alleging that at the date of the passage of the act of September 29, 1890, he was in possession of the land in controversy and had made certain improvements thereon which he described; that he settled the lands with the bona fide intent to secure title thereto, by purchase from the Northern Pacific Railroad Company when earned by it, and that it has not been settled upon by said Scherrer nor cultivated by him.

The register and receiver, after a hearing, found for the contestant, but the decision of your office reverses their action upon the ground that Cooper never resided on the land and that his right to purchase is barred by the limitation contained in the act and subsequent acts amendatory thereof.

Cooper does not claim to have been in possession of the land under

deed, written contract with, or license from the railroad company; it is evident, therefore, that he bases his right in the second paragraph of the third section of the act of September 29, 1890. This appears also from the language of his affidavit which follows that of the act itself, which is familiar, and need not be quoted. It is sufficient to state that the right of purchase is limited in its assertion to two years from the passage of the act. This limitation was subsequently and finally extended, as to the lands involved here, to January 1, 1894 (27 Stat., 427).

No testimony was introduced at the hearing touching the allegation of failure of settlement and cultivation by Scherrer, and that charge, therefore, must fall.

Having failed to exercise his right to purchase within the time required by the statute under which he claims, Cooper's contest must be dismissed, and the decision of your office is accordingly affirmed.

RELINQUISHMENT—CONTEST—RIGHT OF CONTESTANT.

BARRY *v.* WILSON ET AL.

The relinquishment of a part of the land covered by an entry relieves the tract so relinquished at once from its former state of reservation, and a subsequent contest brought against the entire entry could give the contestant no right or interest in said tract, though his right to proceed against the remainder of the entry would not be affected by the relinquishment.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (J. L.)

This case involves the NW. $\frac{1}{4}$ of section 34, T. 122 N., R. 51 W., (Lake Traverse, Sisseton and Wahpeton Reservation), Watertown land district, South Dakota.

On April 15, 1892, (the day on which the lands in said reservation were declared open to entry), John Barry, through his agent, Lee Stover, offered to file his soldier's declaratory statement for said quarter section. The local officers rejected the application. Barry appealed. By letter "C" of March 2, 1893, your office affirmed the decision of the local officers. On June 22, 1893, Barry was notified of said affirmance and of his right to appeal to the Secretary. He did not appeal, and your office decision became final.

On April 21, 1882, Madella O. Wilson made homestead entry, No. 18,796, of said quarter section, alleging in her homestead affidavit:

That she was a soldier's widow, and the head of a family, and a native born citizen of the United States: that she had built a frame house eight by twelve, all finished with shingle roof; and that she made settlement on the tract at inside of one minute past 12 o'clock, noon April 15, 1892.

On June 18, 1892, your office, of its own motion, held her entry for cancellation for premature and illegal entry into the reservation. She

appealed. On August 10, 1893, this Department reversed your office decision; holding that (unlike the case of Oklahoma Territory), the law did not impose any penalty or disability upon persons who entered said reservation before the day fixed by the President's proclamation for the opening thereof. (17 L. D., 153).

On June 21, 1892, Madella O. Wilson relinquished to the United States the south half of said quarter section. Said relinquishment was filed in the district land office on July 25, 1892; and at the same time J. J. Batterton, judge of the county court of the county in which said land is situated, acting for the occupants and inhabitants of the town of Summit, filed a declaratory statement claiming said south half of said NW. $\frac{1}{4}$ as a townsite.

On March 8, 1893, John Barry filed his affidavit of contest against Mrs. Wilson's entry of the NW. $\frac{1}{4}$ of said section 34, alleging—

1. Premature and unlawful entry into the reservation.
2. That said Madella O. Wilson had not established a bona fide residence on said land.
3. That said entry was not made in good faith.

On September 12, 1893, Judge Batterton made final proof for the S. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ for the use and benefit of the occupants of the townsite of Summit. Barry appeared and protested orally, alleging a prior interest adverse to the townsite claim, in that he had before the filing of the townsite declaratory statement, contested the entry of Mrs. Wilson, as he alleged. Barry cross-examined Judge Batterton and his witnesses; but did not introduce any testimony himself.

On February 10, 1894, the local officers dismissed (without having ordered a hearing), Barry's contest against Mrs. Wilson's entry,

because the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 34, T. 122 N., R. 51 W., had been relinquished, and the relinquishment was filed (i. e. was on file), in this office, at the time and before said contest was filed.

And on the same day they dismissed Barry's protest against Judge Batterton's final proof and townsite entry. From both of said decisions Barry appealed to your office.

On July 5, 1894, your office affirmed both of said decisions; and approved Judge Batterton's final proof for townsite purposes, and directed that he be allowed to make cash entry thereon.

On July 16, 1894, Judge Batterton made cash entry of, and procured final receipt and certificate for, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ aforesaid for the use and benefit of the occupants of the townsite of Summit.

On July 23, 1894, Madella O. Wilson filed her relinquishment to the United States of the N. $\frac{1}{2}$ of said NW. $\frac{1}{4}$, and on the same day Miss Enola Sayers made homestead entry, No. 22,039, of the same.

On August 14, 1894, Barry, by his attorneys, filed in your office a motion for a review of so much of your office decision of July 5, 1894, as affirmed the dismissal (without a hearing), of Barry's contest against

Mrs. Wilson's entry of the N. $\frac{1}{2}$ of the said NW. $\frac{1}{4}$, and also an appeal to this Department from so much of said decision as involved the townsite claim of the S. $\frac{1}{2}$ of said NW. $\frac{1}{4}$. The motion for review and the appeal were each accompanied by specifications of error.

On October 13, 1894, your office transmitted to this Department the said appeal; and also without action, said motion for review, holding that the appeal removed the case from your office, and deprived you of jurisdiction to consider the motion for review.

On August 20, 1895, Barry's attorneys requested your office to recall from this Department their said motion for review and the papers pertinent thereto, and to consider and pass upon said motion. And on October 2, 1895, by letter "G" your office advised this Department that you had declined to comply with said request.

I will consider said motion for review as if it were an appeal from your refusal to entertain and consider it, and from the decision sought to be reviewed, and will proceed to consider the whole case in both its aspects, upon the merits.

When on July 25, 1892, Madella O. Wilson filed in the local office her relinquishment of her claim to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 34, said subdivision became instantly open to settlement and entry without further action on the part of the Commissioner of the General Land Office, by virtue of section 1 of the act of May 14, 1880 (21 Stat., 140); and the declaratory statement for the townsite of Summit was on the same day properly filed. No adverse interest then appeared. Barry's contest against Mrs. Wilson's entry was not initiated until March 8, 1893, more than six months afterwards; and then it affected only Mrs. Wilson's entry as it stood, covering only the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 34.

When Barry made his protest against the townsite final proof on September 12, 1893, he had no prior interest in the S. $\frac{1}{2}$ of said NW. $\frac{1}{4}$. The record contradicted his allegation in this behalf. As a mere protestant without interest he had no right to appeal. Your office properly affirmed the dismissal of Barry's protest.

Your office decision of July 5, 1894, affirms the action of the local officers dismissing Barry's affidavit of contest as to the north half of Mrs. Wilson's entry for a different reason from that assigned by the local officers; to wit:

because the allegations therein contained against the validity of said entry, have been declared by the Hon. Secretary, as seen above, insufficient to warrant its cancellation, and another trial of the same question could have no other than a similar result.

In this your office erred. The departmental decision of August 10, 1893, adjudicated only the first charge contained in Barry's affidavit of contest. He is entitled to have a hearing on the other two charges contained in said affidavit as to the north half of Wilson's entry.

For the foregoing reasons your office decision of July 5, 1894 is affirmed

so far as it involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 34, and the town-site entry aforesaid will be held intact. But said decision is reversed so far as it involves the N. $\frac{1}{2}$ of said NW. $\frac{1}{4}$, and Barry's contest of Mrs. Wilson's entry thereof. Your office will direct the local officers to order a hearing of the last two charges contained in Barry's affidavit of contest as to the N. $\frac{1}{2}$ of said NW. $\frac{1}{4}$; and to summon Enola Sayers to attend said hearing and show cause why her homestead entry No. 22,039 should not be canceled.

RAILROAD LANDS—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

STEPHEN v. PAUL ET AL.

The right of purchase conferred by section 3, act of September 29, 1890, is in contemplation of law a pre-emption right, and an entry made thereunder is accordingly subject to the confirmatory provisions of section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (W. F. M.)

On May 20, 1891, Joseph H. Paul made cash entry of the SE. $\frac{1}{4}$ of section 1, township 97 N., range 35 E., in the land district of Walla Walla, Washington, under the forfeiture act of September 29, 1890 (26 Stat., 496).

On October 6, 1893, Benjamin G. Stephen filed an affidavit of contest alleging that Paul had never settled upon the land, that he was never in possession of it under written contract with or license from the Northern Pacific Railroad Company, that he was not in possession of it at or prior to September 29, 1890, and that the entry was not made for the benefit of Paul, but for the use and benefit of one Patrick Russell.

At the hearing Frank W. Paine, receiver of the Walla Walla Saving Bank, alleging the bank to be the mortgagee of Paul's transferee, as to the land in controversy, was allowed to intervene.

The register and receiver found that the contestant had failed to establish his charges, and recommended that the contest be dismissed.

On appeal to your office it was held that "the entry must be confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095)."

The contestant, in appealing to this Department, does not direct attention, in his assignment of errors, to the point upon which the decision of your office turns, but in his brief it is contended, *in arguendo*, "that a purchase under the third section of the act of September 29, 1890, is not a pre-emption right within the meaning of the act of March 3, 1891," and that contention presents the controlling question in the case.

Pre-emption, in its etymological sense, may be said to be the buying or the right to buy before or in preference to any other person, which

differs from its legal sense only in that in law conditions are coupled with and made precedent to the exercise of the right. According to Bouvier it is "the right given to settlers upon the public lands of the United States to purchase them at a limited price in preference to others," and though the term is for the most part used with reference to the special provisions found in section 2259 of the Revised Statutes and other sections *in pari materia*, it is not conceived that the conditions there prescribed, including settlement, are exclusive of every other condition upon which the people are extended the right to acquire the public lands by purchase, thus limiting a broadly generic word to a very narrow sphere of application. Thus, in *Fraser v. Ringgold*, 3 L. D., 69, it is said

that where a special preference is given to a claimant, dependent or contingent upon the performance of conditions which any one of a qualified class may reasonably fulfill, by which he may hold to the exclusion of others, such preference is a pre-emption.

In the case of *Johnson v. Burrow*, 12 L. D., 440, it was held that an Osage cash entry "might be confirmed under the provisions of the 7th section of the act of March 3, 1891," notwithstanding it had been held in the earlier case of *United States v. Woodbury et al.*, that such entries are not subject to the provisions of the general pre-emption law.

In *Fleming v. Bowe*, on review, 13 L. D., 78, after the announcement that "said act of 1891 must be held to be remedial and construed liberally so as to carry out the purpose of the enactment, and advance the remedy contemplated by the legislature," it is held that Otoe and Missouri cash entries are subject to confirmation.

That the third section of the act of September 29, 1890 (26 Stat., 496), confers a clear pre-emptive right upon the two classes of persons there mentioned is deducible from the language of the act as well as from the books. As to those of the first class, they must have been in possession, merely, under the authority of the grantee State or corporation, and as to those of the second class, they must have settled with bona fide intent to secure title by purchase from the grantee State or corporation; and in both cases the person must be a citizen of the United States, or must have declared his intention to become such. In such case conditions were attached to the exercise of the right given just as conditions were coupled with the Otoe and Missouri and Osage cash entries, but not the conditions of the general law. They already, before the passage of the act, occupied the status of pre-emptors with respect to the grantee, and the lands having, by virtue of the act, reverted to the United States, Congress has provided that they shall bear the same relation to the government that they but recently sustained towards the grantee.

I think the decision of your office should be affirmed, and it is so ordered.

PAYMENT—REGISTER—LOSS OF FINAL PROOF PAPERS.

WILLIAM D. REILLY.

The payment to the register of the purchase price of a tract of land is unauthorized by law, and on the failure of such officer to turn over such money to the receiver, or account for the same, the government is not chargeable therewith.

Judicial proceedings by the government on the bond of a register for the purpose of requiring him to account for an alleged loss of final proof papers will not be advised, as no injury to the government results from such loss.

A demand on said officer may be properly made for the production of the lost papers, and if said papers are not secured thereby, the contents of the same may be shown, or new proof submitted.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (E. M. R.)

The record shows that on July 28, 1894, your office decision was rendered in the above-entitled case refusing to recognize the payment made by Francis T. Reilly on his preemption entry No. 1272, for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 19, and SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 18, T. 10 S., R. 8 W., Las Cruces land district, New Mexico. The case is before the Department upon appeal by William D. Reilly from your said decision. It appears that two affidavits are filed in the case, as a basis for the relief prayed for:

That of J. M. Webster sets out that during the year 1886 he was the probate clerk of Sierra county, New Mexico; that on December 13, 1886, Francis T. Reilly appeared before him, in pursuance to notice, and made final proof on his preemption entry made December 26, 1883, and paid to him the sum of two hundred and two (\$202.50) dollars and fifty cents, being the purchase money due the United States on land covered by the entry, together with the fees due the register and receiver; that on December 13, 1886, he purchased from the postmaster at Hillsborough, New Mexico, post office order No. 562, for one hundred (\$100) dollars, made payable to Edmund G. Shields, Las Cruces, New Mexico, and post-office order No. 563 for one hundred (\$100) dollars, and postal note No. 294 for two (\$2 50) dollars and fifty cents made payable to the same person, at the same address. Further, that at the same time he transmitted the final proof of Francis T. Reilly, with the above enumerated orders to Edmund G. Shields, register of the land office at Las Cruces, New Mexico; that he never received the final receipt and is informed and believes that the final receipt was not received by Francis T. Reilly.

It appears from the affidavit of William D. Reilly that he is a brother of the entryman and that the said Francis T. Reilly died in July, 1888; that about the 10th or 11th of December, 1886, the entryman, with Cris Olson and Harvey Taylor, left for the town of Hillsborough, New Mexico, to submit final proof before J. M. Webster, probate clerk of Sierra county; that upon his return the entryman told him that he had made final proof and he had paid to the probate clerk the sum of two hundred

and two (\$202.50) dollars and fifty cents, to be sent to the land office at Las Cruces, and that his brother never received the final receipt. Affiant further states that he went to Las Cruces and there ascertained that the money orders and postal note, hereinbefore referred to, had been paid to Edmund G. Shields, on December 15th and 26th, 1885, and the affiant asks, in view of the foregoing and the further fact that the entryman had complied with the law during his life, that patent now be issued. The affiant also asks that Edmund G. Shields, register, be called upon to account for the final proof sent him, and that if he fail to produce the said papers, suit be brought to indemnify the heirs of the entryman for any loss occasioned thereby.

The decision appealed from held that the register was not the proper officer to receive the money, that he only acted as the agent of Francis T. Reilly, and that the government could not therefore recognize the payment made to the register as binding upon the government.

It does not appear in what capacity William D. Reilly is before the Department, whether as executor, administrator, as heir at-law, or in some other capacity, nor is it clear that the decision of the Department will, under these circumstances, be binding upon the proper party, or parties. The regular course, therefore, would be to return the case in order that the appellant might show his interest in the subject-matter of the suit, but in view of the conclusion reached upon the merits of the case, it would only be putting the applicant to possibly extra expense and certainly hold the matter up for an indefinite time.

Section 2234, Revised Statutes, provides:

There shall be appointed by the President by and with the advice and consent of the Senate, a register of the land office and a receiver of public money for each land district established by law.

On page 109 of the General Circular, the following appears:

Registers of land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salary, fees and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the same to the receiver; and where the parties address the register as to the cost of any service required, he will refer the matter to the receiver for answer, as the latter is the proper officer to receive all public moneys.

It is clear from the above that the receiver is the only proper officer to whom moneys can be authoritatively paid, and that he is the only officer so held out by the government to the public, and it is only when payment is made to him that the government, in contemplation of law, can be said to have received the money. It therefore follows, that if the money in this case was paid to the register, he acted only as the agent of the entryman and not of the government, and the remedy of the applicant lies against him, and the government cannot be charged with receiving that which was paid to an officer upon whom there was no authority conferred to receive moneys.

If the money had been paid to, or received by, the receiver, an

entirely different state of facts would have been presented for departmental adjudication.

An examination of the decision appealed from, however, fails to show that it passed upon the other issue raised by the applicant, that is, that the register should be compelled to account for the loss of the final proof of the entryman, and if it be not produced, that action should be commenced against his bondsmen to indemnify the heirs of Francis T. Reilly for any loss that may be occasioned them by his alleged wrongful conduct. The register was the proper officer to whom the papers should have been forwarded, but in view of the fact that the United States has not been damnified by the alleged wrongful conduct of the register, this Department can not urge a suit to be brought upon his bond as prayed for by the applicant. *United States v. San Jacinto Tin Co.* (125 U. S., 273, and cases therein cited.)

But the showing made is sufficient upon which your office may make demand upon the then register for the production of the papers, if they are in his possession, and upon the failure to secure the papers in this way the heirs of Francis T. Reilly will be allowed either to prove the contents of the original proof or to make new proof showing that the entryman complied with the law during his lifetime.

The decision appealed from is accordingly modified.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

O'BRIEN v. NORTHERN PACIFIC R. R. Co.

Indemnity selections made under the departmental order waiving specification of loss are valid, and while of record a bar to the allowance of adverse claims. A list in bulk of lost lands filed thereafter in support of such selections does not invalidate the same, nor can a subsequent rearrangement of said list, tract for tract, to correspond with the selections, be regarded as an abandonment of the company's right under its original action.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (I. D.)

Involving the NW. $\frac{1}{4}$, Sec. 11, T. 17 N., R. 45 E., Spokane land district, Washington.

This land is within the indemnity limits of the grant to the defendant-company, and on December 17, 1883, said company filed its list selecting this, with other lands, as indemnity lands under its grant.

June 8, 1892, O'Brien made application for homestead entry for said land claiming settlement from about October 15, 1885, and claiming that at the time of the company's selection aforesaid, this land was held by a valid adverse settlement existing thereon.

The evidence shows that one Thos. Gribben made some improvements on the land in connection with an adjoining quarter section (the NE. $\frac{1}{4}$ of Sec. 10), upon which he made homestead entry March 21, 1884, and that he held possession of the land in controversy until 1885 when

he turned it over to O'Brien who, from October 15, 1885, held possession and lived thereon, expecting to make homestead entry for it.

The local officers upon the hearing recommended the rejection of O'Brien's application to make homestead entry.

Gribben never lived on this land but resided on his adjoining quarter section from his first settlement until after he completed his homestead entry, and until his death afterwards. He therefore could not have had such possession of the land in dispute, as a settler, that would prevent its selection by the company and O'Brien gained no rights by succeeding to such illegal possession. His rights must rest on his application and settlement of October 15, 1885.

Your office decision holds that the company lost its rights under its selection of December 17, 1883, by afterwards filing a rearranged list with the lost lands arranged tract for tract with the lands selected in original list of December 17, 1883.

This Department by letter of May 28, 1883, specifically instructed your office, which instructions were transmitted to the various local officers along the line, to allow the Northern Pacific Railroad Company to make selection of indemnity lands "leaving the ascertainment of the lands lost in place to your office instead of requiring preliminary lists of such lost lands tract for tract from the company as heretofore."

These instructions remained unchanged (as to the defendant-company) until August 4, 1885, when, by circular, registers and receivers were instructed:

Where indemnity selections have heretofore been made without specification of losses you will require the companies to designate the deficiencies for which such indemnity is to be applied, before further selections are allowed. (4 L. D., 90.)

So the list filed by the defendant company in December, 1883, was in accordance with the instructions from the Department then in force, and was a valid selection.

Afterward the company, on October 31, 1887, filed a list specifying the losses, but the lands so specified were given in bulk.

On August 30, 1892, the company filed a list of the same lands but rearranged so as to designate losses tract for tract with the selected lands.

O'Brien made application for his homestead entry June 3, 1892, based on his settlement of 1885.

It is claimed that the ruling in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406) applies, and that the filing of a rearranged list subsequently to O'Brien's application is an abandonment of the selection of 1883; but in the *La Bar* case the last list filed, giving the losses tract for tract (instead of in bulk) and applying it to the indemnity list, shows that there was a change in a part of the lands; that is, the last list embraced lands not covered by the former one and was in fact a different list, and it is said in that decision, page 408,—

It is plain that it was intended as a substitute or amendment of the old list, and

on account of its variance therefrom must be treated as an abandonment of the old list, for the company cannot stand on two lists, specifying different losses as the bases therefor. . . . When La Bar settled on October 1, 1887, he settled subject only to the selection of 1883 which having been abandoned, removed any bar against his settlement.

But it is not claimed in this case that the last list of lost lands contained other or different lands, or less or more, than was in the list specifying the lost lands in bulk.

As to the selection made December, 1883, specifying no losses either in bulk or tract for tract, that was unquestionably a valid selection when made, and

the selection having been made in conformity with the order dispensing with the necessity of specifying losses tract for tract, it was legally made, and while it remains on the records of the office it imparts notice to all settlers and entrymen. *Sawyer v. Northern Pacific R. R. Co.* (12 L. D., 448), and *Clancy v. Hastings and Dakota R. R. Co.* (17 L. D., 596).

October 31, 1887, the company filed a list of losses to be applied to the prior indemnity selections of 1883, but it seems to have been in bulk. The company could have been required to rearrange this list so as to show the losses and designate the lost lands tract for tract with the indemnity lands so selected in 1883, and while it does not appear whether the company was required to rearrange the list of losses in that way or voluntarily did it, yet, on August 30, 1892, the company filed a rearranged list designating the lost lands tract for tract, so it could be applied to the selection of December, 1883.

It does not appear that the company did anything that could be construed into abandonment. The first list of lost lands filed in 1887 did not invalidate the selection of 1883 as your office decision properly holds, nor was it necessary in order to validate such selection. The circular of 1885, *supra*, does not provide, even inferentially, that a failure to file a list of losses will render nugatory selections theretofore made, but that such list must be filed "before further selections are allowed."

In the case of the Southern Minnesota Railway Express Company (12 L. D., 518), it was held that indemnity railroad selection will not be *approved*, in the absence of due specification of the losses for which the indemnity is asked, and the list submitted was returned that the losses might be specified.

In the present case, the list is not here for approval, and, while I should refuse to approve this selection until a loss is specified, yet, for the reasons before stated, the selection was a bar to Clancy's entry, and the same must accordingly be canceled, unless, after due notice, he elects to permit the same to stand subject to the approval of the company's selection. *Clancy v. Hastings and Dakota R. R. Co.*, *supra*.

By the rearranged list the company claimed no more or different lands than were included in the selection of 1883, nor does it appear that it changed, by an acre, the losses to be applied to such selection, but simply rearranged the list of 1887 so as to specify a loss for each particular tract selected. Its selection has, since 1883, remained of record, a notice and bar to the allowance of any adverse claim.

Your office decision is reversed.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

DUNNE v. STONE.

An application for the right of purchase, on behalf of a partnership firm, made in accordance with the circular notice of a railroad company, may be properly the subject of assignment to one of the members of said firm, through agreement of the parties, and thus confer upon such assignee the status of a licensee entitled to invoke the provisions of section 3, act of September 29, 1890.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (W. F. M.)

On July 28, 1892, James F. Dunne filed an application to purchase, under the first clause of the third section of the act of September 29, 1890 (26 Stats., 496), lots 1, 2, 3, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$, of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 23, township 17 S., range 8 E., within the land district of San Francisco, California.

On August 1, 1893, the day on which Dunne was to make final proof according to his published intention, he was met by Richard T. Stone, a homestead claimant in partial conflict, who disputed his right, and a hearing was then held upon the issue as to whether or not Dunne was a possessor of the land claimed by him under a license from the Southern Pacific Railroad Company in such a manner as to entitle him to the benefits of the act.

The register and receiver found for Dunne, but on appeal to your office it was held that "Dunne does not hold by deed, written contract with or license from the railroad company or its assignees," and his application and final proof were rejected.

Dunne has appealed here.

Donnelly, Dunne and Co., a partnership composed of Edward T. Donnelly, James F. Dunne, and A. J. Donnelly, took possession of the land in controversy about 1869, and has held it to the present time. On March 19, 1873, E. T. Donnelly and A. J. Donnelly, acting for the firm, made application to the Southern Pacific Railroad Company to purchase section 23, township 17 south, range 8 east, upon the terms cash or credit at the option of the company. Subsequently, about the year 1884, it was agreed among the members of the firm that each should have the benefit of certain specified applications for the purchase of lands of different classes made in behalf of the partnership. By the terms of that agreement Dunne took the interest of the partnership in the application to purchase the land in contest, together with the rights growing out of the same.

In the decision appealed from it is said, that

E. T. Donnelly and A. J. Donnelly may have become licensees of the railroad company, but Dunne certainly can not successfully claim a license from said company, nor can he hold by virtue of a verbal assignment from E. T. and A. J. Donnelly, for the statute of frauds forbids such a conveyance.

I think there can be no doubt that the application gave the two Donnellys the attitude in law of licensees.

From the decision of the register and receiver it is learned that

they went into possession and incurred the expense under a license from the company, inviting settlers on their lands and notifying persons to purchase, both by circulars, which they distributed, and advertisement in newspapers. Under these invitations many thousand persons improved land reserved for the railroad company.

In the case of *Eastman v. Wiseman*, 18 L. D., 337, where the nature of the license contemplated by the statute is exhaustively discussed, after stating the proposition that a license may arise by implication from circumstances, it is held that the invitations issued by the railroad company, coupled with an implied acceptance of the invitation by an application to purchase, constitutes a license from the company to enter upon and take possession of land for the purpose of making improvements thereon under a guarantee of title from the company, after the performance of certain conditions precedent, as set forth in the circulars of invitation.

It is further held in that case that such a license, being coupled with an interest, may be the subject of assignment, and when assigned carries with it all the rights and privileges of the original licensee.

It is not disputed that the members of the firm of Donnelly, Dunne and Company made a verbal agreement in 1884, the object of which was to effect a division of those of its assets consisting of licenses and applications to purchase public and other lands, nor is it disputed that the license to purchase the land in controversy is an asset of the firm, notwithstanding the application was made by individual members of the firm.

I can not assent to the proposition that the arrangement among the partners looking to a division of their interest is reprobated by the statute of frauds, or any other rule of evidence on the subject of conveyances of real estate. In *Eastman v. Wiseman*, *supra*, an assignment of such an interest was recognized, and there is nothing in the decision to show that it was in writing. There was, it is true, a written relinquishment of his right to the land, but it is not shown that that instrument possessed the incidents of a deed of real estate.

I find from the evidence that the application in this case was made in behalf of the partnership of Donnelly, Dunne and Company, and that by virtue of an agreement subsequently entered into by the parties, members of the firm, the interest of the firm in the license passed to Dunne.

The decision of your office is, therefore, reversed.

HOMESTEAD CONTEST—FAILURE TO MAINTAIN RESIDENCE.

JOHNSON v. EASTER.

The plea of ill health can not be received as an excuse for failure to maintain residence, and make substantial improvements, unless good faith is shown, and it is clearly apparent that such failure is due to the causes alleged.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (J. I. H.) (C. J. G.)

This controversy involves the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 49 N., R. 9 W., Ashland land district, Wisconsin.

Joseph H. Easter made homestead entry of the same March 23, 1891.

William H. Johnson filed affidavit of contest against said entry December 9, 1893, alleging substantially that Easter failed to cultivate or improve the land during the year 1893; that he has never established or maintained a residence thereon; that the last visit to said tract was made by the entryman in April, 1893; that he is informed and believes that Easter resides in Chicago, Illinois, and has resided there at all times since making his entry, his post-office address being Roger's Park, Chicago, Illinois; and that said entry was not made in good faith, but with the fraudulent intent of obtaining title to said land by a colorable compliance with the homestead law.

The hearing was had on February 12, 1894. Johnson appeared in person, and by attorney. Easter appeared specially by attorney only, who moved to dismiss the contest for want of jurisdiction, in that Easter had not been personally served with notice of contest. This motion was overruled. Easter's attorney then filed a motion, supported by affidavit, for a continuance, on account of the absence of necessary witnesses. As Johnson admitted that the witnesses named in Easter's affidavit would, if present, testify as therein set forth, including Easter himself, the case proceeded to trial.

Upon an examination of the testimony the local office rendered decision in favor of the contestant, and recommended the cancellation of Easter's entry. The latter appealed to your office, and by letter of September 24, 1894, you reversed the decision of the local office and held Easter's entry intact.

Johnson appeals to this Department.

In their decision the local officers say—

the affidavit of Easter for a continuance in this case alleges ill-health as a sufficient excuse for his failure to reside upon the homestead. We do not think the facts therein set up are a valid ground for his continued absence and failure to comply with the homestead law.

Substantially the facts in the case are as follows—Formerly there was a contest between the same parties involving the same land, on the question of priority of settlement and residence. The decision was in Easter's favor, with the exception of one forty. So there appears to

be no question as to establishment of residence; but whether, once established, it has been maintained. Also there is no question as to Easter's absence from the land a year or more prior to date of contest; but whether said absence was justifiable or excusable.

In his application Easter stated that he is unable, on account of sickness, to attend the trial; that he is now, and for more than a year last past has been afflicted with epilepsy or falling fits, and has not been in such condition of health as would permit him to live on the homestead without the continuous attendance and care of an assistant; that he has been advised by his physician that he is liable at any time to have such an attack of the disease as to require the immediate attendance of a physician, which he could not have out in the woods on his homestead away from any town or village in which a physician is located; and that he is unable financially to employ any one competent to take care of him, and give him constant attention on the homestead.

The testimony shows that Easter left the land in December, 1891, and was absent until May, 1892, when he returned to the homestead for three days. During this visit he did a little clearing and planted a garden patch of about six square rods, the crop being neither cultivated or gathered. He was absent until the following November, in which month he was on the place one or two nights. He then boarded up and nailed the doors and windows of his cabin. It does not appear that he was again on his homestead, and in April or May, 1893, he went to Chicago, Illinois, where he has since remained.

Outside of the garden patch and the clearing, the latter estimated to be worth ten or twelve dollars, Easter's improvements consisted of a cabin twelve by fourteen feet, worth from twenty to twenty-five dollars. The land in controversy has been in Easter's possession since 1890, and yet, according to his own estimate, only about one and two-thirds acres are cleared; most of this was done prior to the former contest.

It was error for your office to find that Easter resided continuously on this land from August, 1890, until December 22, 1892. According to his own statement defendant was only there from August, 1890, until December 22, 1891, a period of sixteen months. He makes no claim of residence or cultivation during 1893. The evidence shows that he was present in May, 1892, for two or three days; also in November of the same year for one or two nights. This would indicate, up to the date of contest and immediately prior thereto, an almost continuous absence of over two years.

The testimony further shows that prior to the last time Easter went away he was in ordinarily good health. When Easter left his claim the last time he told Johnson that he was going to Minneapolis to the National Convention, and presumably alone. It was stated that he used to pack on his back fifty to seventy pounds from Brule, a distance of twelve or thirteen miles. While at that time he may have been suffering from epileptic fits, it is not shown that he was wholly incapacitated from performing more work than the present improvements on the land would indicate. There was no cultivation except a small gar-

den, and that was said to be near the river in sandy soil, which probably did not need clearing before planting.

The evidence would tend to show that Easter became too confident from his success in the former contest, where the decision in the matter of prior settlement was in his favor. When he left the land the last time he evidently knew that his absence would be indefinite; this is shown by the fact that he nailed up the doors and windows of his cabin.

The nature of Easter's disease, epilepsy, was not such as to preclude him from making all necessary preparation for his absence, namely applying for leave of absence. The laws are very lenient in respect of persons afflicted by temporary illness or permanent disease, and full provision has been made therefor in section 3 of the act of March 2, 1889 (25 Stat., 854). The only requirement is that the applicant should explain its necessity and apply for leave of absence. Easter made no such application and his absence for so long a period, from whatever cause, was entirely unauthorized.

The government is disposed to be liberal in its treatment of entrymen, who, by reason of sickness and disease, are unable to fully comply with the laws regulating the entry of the public lands, but I am inclined to think it would be an exercise of liberality and leniency beyond what was intended by Congress to allow the present entry to remain intact. I am of the opinion that the plea of sickness cannot be received as an excuse for failure to maintain residence on a homestead entry and make substantial improvements thereon, unless good faith is clearly shown, and it is very apparent that such failure is due to the causes alleged.

Easter's sickness might possibly be an excuse for his laches during the year immediately preceding the date of contest, but it certainly cannot atone for his want of cultivation and improvement for the several years the land has been in his possession, and especially for his failure to reside upon and improve his claim for as many as two years prior to the date of contest; nor can it excuse his neglect in applying for leave of absence the last time he left the land, when he must have known that he would be away indefinitely.

In all the cases cited in support of your office decision, good faith was an essential element. Under the leave of absence act good faith must be affirmatively shown. Unless that appears, the leave of absence will be refused. Certainly, where an entryman voluntarily absents himself from his claim, the acts and circumstances surrounding his case should be carefully considered, and his good faith should be clearly apparent. If it is not, his entry should be forfeited. In my estimation such good faith has not been shown in the present case as to entitle Easter to have his entry held intact.

Your decision is therefore reversed, Easter's entry will be canceled, and preference right awarded to Johnson.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* FLANNERY.

In case of a contract of purchase made with a railroad company, involving a specific tract within the indemnity limits of the grant, the subsequent selection of such tract by the company will be presumed to have been made for the protection of the purchaser; and his subsequent residence on the land, in reliance on the company's title, cannot be held as conferring any right as against the company.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (F. W. C.)

I have considered the motion filed on behalf of the Northern Pacific Railroad Company for reconsideration of departmental decision of February 23, 1895 (20 L. D., 138), in the case of the Northern Pacific Railroad Company *v.* Frank Flannery, involving the NE. $\frac{1}{4}$ of Sec. 15, T. 8 N., R. 12 E., Helena land district, Montana.

This case arose upon an application filed by Flannery December 4, 1886, to make entry of the land before described under the homestead laws, which application was rejected for conflict with the indemnity selection of the Northern Pacific Railroad.

The land is within the indemnity limits of the grant for said company and was included in its list of selections filed February 26, 1885.

In the homestead affidavit filed by Flannery which accompanied his application presented on December 4, 1886, he alleged settlement upon the land in October, 1882, and with register's letter of January 7, 1889, was forwarded a second affidavit by Flannery, executed November 19, 1888, in which he alleged settlement upon the land April 1, 1883, and that he had since continued residing upon and improving the land. In this affidavit he also alleged that shortly after making settlement upon the land he was informed that it was included within the indemnity limits of the railroad grant and that title could only be acquired through the company; that he thereupon entered into an agreement with the company for the purchase of this land and made payments at various times on account thereof, aggregating between three and four hundred dollars; that as soon as he learned that he was entitled to make entry under the public land laws he discontinued his payments under the contract with the company, and that he had at all times resided upon and claimed the land as his home.

Upon this affidavit your office ordered a hearing. The testimony taken at such hearing showed that in 1882 Flannery purchased the improvements made by a prior settler upon this land, who gave him possession; that he, Flannery, made actual settlement thereon in February, 1883, and that he had since continued residing upon the land, cultivating and improving the same; his improvements at the date of the hearing being valued at the amount of \$1000.

There was no evidence offered at the hearing relative to an agreement entered into between Flannery and the company for the purchase of this land.

Your office decision of May 1, 1891, held the company's selection for cancellation with a view to allowing Flannery's application, from which the company appealed to this department, the appeal being considered in departmental decision of February 23, 1895, *supra*.

In that opinion it was held:

There can be no question under the testimony, but that at the date of selection and for more than two years prior thereto, this land was in the possession and occupancy of Flannery, and while it is true that he admits a previous agreement with the company to purchase of it its title to this land, yet I do not think that the showing made is sufficient to avoid his settlement.

It is clear that he did not go upon the land in accordance with a previous agreement made with the company; in other words, the company did not put him in possession of the land, for it is clearly shown that he purchased the improvements of a prior settler and that it was not until after he had lived upon the land for some time that he learned of the adverse claim of the company. Learning of this adverse claim on account of the grant, and in order to protect himself in his possession, he contracted with the company for the purchase of this land and on account thereof made payments as before stated; but as soon as he learned that he would be permitted to make entry under the settlement laws, he repudiated his contract with the company and made application under the homestead laws, as before stated.

Your office decision was therefore affirmed. A review of said decision was denied February 23, 1895 (20 L. D., 466).

The basis of the motion under consideration is that Flannery, on January 25, 1885, before the company made selection of this land, entered into a contract for the purchase thereof from the company, and that said contract was never repudiated, but on the contrary, full payment was made on account thereof and the tract deeded to Flannery by the company on August 7, 1891.

Accompanying the motion is a letter from Flannery addressed to the company, in which, after setting out the fact that he had bought said land from the company and received its warranty deed, he states as follows:

A few days ago I received notice that the Hon. Secretary of the Interior has decided that the NE. $\frac{1}{4}$, Sec. 15, T. 8 N., R. 12 E., is government land and directing cancellation of the railroad section (selection). I sold the land three years ago with a warranty deed. The party I sold to has notified me to make the title good. Will you appeal the case or what will you do? Please write me and let me know all about it.

The company has, since filing the motion under consideration, filed a waiver by Flannery of any claim under his settlement upon this land adverse to the company.

From the above it would appear that the decision of this Department has miscarried, for it would appear that Flannery did not abandon his contract with the company, but completed the same and has since sold the land relying upon the company's warranty. It would therefore seem that in reality he had abandoned the claim initiated by the presentation of his homestead application.

At the time of the rendition of the decision of this Department all the facts relative to the contract entered into between Flannery and the company were not before this Department. For this omission it would seem that the company alone is responsible. It would appear, however, that sufficient showing has been made to warrant the reversal of the previous decision of this Department.

Flannery having entered into a contract with the company for the purchase of these lands prior to the selection of the same by the company, it must be presumed that the subsequent selection made by the company was on account of and for the protection of Flannery under his contract entered into as before stated. His subsequent actions show that he has relied upon the company's title since making said contract and he can not be held to have acquired any rights by his subsequent residence upon and improvement of this tract that would defeat the company's right under its selection made as before stated.

The previous decision of this Department directing the cancellation of the company's selection of the tract, on account of the settlement claim of Flannery is recalled and vacated, and said selection, if canceled upon your office records, will be re-instated. Flannery's application will stand rejected.

RIGHT OF WAY—TOLL ROAD—SECTION 2477, R. S.

WASON TOLL ROAD CO. *v.* CREEDE TOWNSITE (ON REVIEW).

In recognizing a right of way claimed on behalf of a toll road under section 2477, R. S., the Department will not, in the absence of express statutory authority, determine the width of such right of way.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (P. J. C.)

I have before me a motion for review of departmental decision of October 31, 1895 (21 L. D., 351), filed by counsel for the townsite of Creede.

It appears that the mayor of the town of Creede submitted proof of settlement and occupancy of certain lands in Secs. 19 and 20, Tp. 42 N., R. 1 E., and Sec. 25, Tp. 42 N., R. 1 W., Del Norte, Colorado, land district, and sought to enter the same for the benefit of the settlers thereon. The Wason Toll Road Company protested, claiming a right of way of one hundred feet through the land for the operation of its toll road.

A hearing was ordered, and as a result the local office recommended a dismissal of the protest. On appeal, your office affirmed this action, and the Department, by its said decision, reversed the judgments below, holding that the road company, being the prior occupant of the land, was entitled to its right of way.

Review of this judgment is now asked, and the errors assigned are (1) that it was error to hold that the rule in the case of *Deffeback v. Hawke*, 115 U. S., 392, does not apply to this case; (2) in holding that the grant of the right of way was akin to the statutory grant of right of way to railroad companies; (3) in holding that there were no settlements at Creede prior to the location of the toll road; (4) in holding that the case of *Smith v. Townsend*, 148 U. S., 490, is an authority for or has any bearing on the case at bar; (5) in citing as authority the quotation from 6 Am. & Eng. Enc. of Law; and (6) it is insisted "that there is nothing whatever in this case, as disclosed by the record, authorizing the right of way of this company to be one hundred feet wide."

It will be seen by an examination of the reported case that all of the questions suggested by this motion were given consideration, with possibly the exception of the last. The authorities cited and relied upon and the discussion in relation thereto will be adhered to.

The Department did not hold, as stated by counsel, that there was no settlement at Creede prior to the location of the toll road. What it did say was, that "there were but two or three cabins in what is now Creede, outside of the 'commissary' of the mine," at the time the road was surveyed and construction begun. It is conceded that at the time the road was constructed through the town, a considerable portion of it was occupied by settlers.

As to the last suggestion of counsel, it may be said that the Department did not decide that the road company was entitled to one hundred feet. What it decided was that "patent will issue to the townsite, if otherwise satisfactory, for the land claimed, subject, however, to the easement of the Wason Toll Company's right of way for the road through the land thus patented." It will thus be seen that the width of the right of way was not fixed. This was not accidental at all. This matter was considered, and it was determined that it was doubtful whether the Department would have jurisdiction to fix the width of the right of way in the absence of express authority by Congress. It was therefore deemed advisable not to decide this question, inasmuch as the State court, or authorities, after title had passed from the nation, had full power to settle this controversy.

It is true that the Road Company claims one hundred feet in width as its right of way, and, while the Department sustained its contention as to its right of way, the width thereof was not determined, and it was not intended to be.

The motion is therefore overruled.

OKLAHOMA LANDS—COUNCIL GROVE TIMBER RESERVE.

W. F. MACMARTIN.

Council Grove military timber reserve established prior to the opening of the Creek lands, though falling within the limits of the lands opened by the President's proclamation, was noted on the maps of official and public survey as excepted from settlement, and therefore reserved by competent authority.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (A. E.)

On November 13, 1894, your office affirmed the rejection by the local office of MacMartin's application to make homestead entry of the NE. $\frac{1}{4}$, Sec. 33, T. 12, R. 4 W., I. M., Oklahoma, Oklahoma. The application was made July 16, 1894. The rejection was because the land was within a military reservation, segregated from the public domain by executive order, dated December 26, 1885, and April 19, 1889.

This tract was a portion of the lands the occupancy title to which was ceded by the Creek Indians to the United States in 1866 for the purpose of settling friendly Indian tribes thereon. On December 31, 1885, by general orders No. 128 of the Secretary of War, a military timber reservation known as Council Grove was proclaimed and the tract in question is within its limits.

It is contended by appellant that this land was opened to homestead entry by the act of March 2, 1889, and by proclamation of the President, dated March 23, 1889.

The reservation was within the territory ceded by the Creek Indians on January 19, 1889, and ratified by Congress on March 1, 1889 (25 Stat., 757). The ratifying act (section 2) says:

That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries not exceeding one hundred and sixty acres to one qualified claimant.

In the act of March 2, 1889 (25 Stat., 980), applying to the Seminole lands, it was provided (section 13):

That the lands acquired by the United States under said agreement shall be a part of the public domain, to be disposed of only as herein provided.

Further in the same section, after providing that the lands shall be opened by proclamation of the President, it is stated that all the foregoing provisions shall apply to and regulate the lands acquired from the Muscogee or Creek Indians by the cession of January 19, 1889.

The proclamation opening these lands was signed March 23, 1889, and while the boundaries of the land declared open for settlement, included within them the Council Grove military timber reservation, that reservation was excepted from entry and set aside and marked on the official and public map of the lands opened for settlement and

entry, and the statement printed on the map was "Timber reserve not open for settlement."

In view of this it must be held that the land applied for was reserved by competent authority, and your action in rejecting the application of MacMartin is affirmed.

PRACTICE—REVIEW—CONTEST—SETTLEMENT RIGHT.

LEMMONS *v.* WILLIAMS.

An allegation of amicable adjustment prior to judgment, made on motion for review, may be properly treated as the basis for further inquiry and decision in accordance therewith.

As against third parties the settlement right of a claimant will be protected during the pendency of proceedings between such claimant and a prior entryman.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (A. E.)

I have before me a motion for review of departmental decision of July 12, 1894 (19 L. D., 37), there entitled Lawson H. Lemmons, which decision awarded to said Lemmons the SE. $\frac{1}{4}$ of Sec. 28, Tp. 8 N., R. 15 W., Oklahoma, Oklahoma Territory. The motion for review has been filed by Daniel C. Williams.

In order to fully understand the relations of the respective parties, the following recital will be appropriate.

Williams applied to file soldier's declaratory statement for the tract described May 4, 1892, without proof of service in the United States army during the war. His application was suspended for the purpose of allowing him to furnish the missing proof, which he did on June 6, 1892, and the application was allowed. In the meantime, on May 31, 1892, Lemmons was allowed to make homestead entry of the tract in question. Subsequently, to wit, on June 24, 1892, Williams was allowed to carry his declaratory statement into a homestead entry.

On the issue thus raised between the parties, both of whom, as above seen, had entries of record, the Department, in the decision under review, held that Lemmons had the better right, inasmuch as at the date of his application to enter the application of Williams to file soldier's declaratory statement was incomplete and defective, thus reversing the decision of your office which awarded the superior right to Williams, on the ground that when he had cured the defect in his application to file, his rights related back to the original presentation of said application.

The motion for review, while not directly attacking the judgment above indicated, asks a reconsideration and review on the ground that the case between the parties had, prior to said decision,

been compromised and settled; that the said Lawson H. Lemmons had abandoned and withdrawn all claim to the tract therein involved, and that through inadvertence and error said cause was allowed to proceed to a final decision.

Williams accompanies this motion with his affidavit, dated February 28, 1894, stating that he had just been informed of the departmental decision of July 12, *supra*, holding for cancellation his entry, and that prior to the issuance of said decision he had

secured, as he supposed, the withdrawal of the said appeal and the relinquishment of said Lemmons; that on September 27, 1893, your affiant compromised all the issues between himself and Lawson H. Lemmons, and said Lemmons executed a withdrawal and relinquishment of all claims to the tract herein involved, and as your affiant understood and believed notified his attorney of record to withdraw his appeal, and following out said withdrawal and dismissal left said tract and went to some point in the Indian Territory, or in the Oklahoma Territory near Fort Sill, O. T.; that since said time Lawson H. Lemmons has not resided upon said tract, nor laid any claim thereto, and that it has been through a mistake, error and oversight of the attorney of Lemmons that the appeal was not dismissed and the relinquishment of Lemmons filed.

Williams further states that he is now and has been for more than a year the sole and only occupant of said tract, that he has valuable and permanent improvements thereon, consisting of a house, all of said tract under fence, and seventy acres under cultivation—all valued at about \$600.

The foregoing affidavit is substantially corroborated by affidavit of George Gordon, made September 27, 1894.

It appears from papers with the motion that service of notice of the departmental decision under review was accepted, September 12, 1894, by H. C. St. John, as attorney for Lemmons, and was served upon Howe and McMachan, attorneys for Williams. It also appears that service of the motion for review and accompanying affidavits was accepted September 27, 1894, by St. John as attorney for Lemmons.

Notwithstanding what has been said above, a letter has been filed, under date of September 15, 1894, by George E. Lemon, Esq., of this city, entering his appearance for Lawson H. Lemmons, in the case of Lemmons *v.* Williams now on review before the Department, and asking to be informed of any action taken relative to said motion.

If the facts be as set out in the motion for review, and they have not been thus far denied, although, as above stated, said motion was duly served upon H. C. St. John, signing himself attorney for Lemmons, there would seem to be no good reason why Williams should not ultimately secure the land upon which he has settled, as aforesaid.

The motion and accompanying papers are returned herewith, and you will cause inquiry to be instituted as to whether a relinquishment by Lemmons of the tract in question has ever been filed. If it be found that relinquishment has been duly filed, you will notify Williams that he may again make entry of the land in question; for on the record as presented to the Department when the decision was rendered, I am yet of the opinion that the judgment was correct, and that Williams's entry was properly canceled. Should it be found that no relinquishment has been filed by Lemmons, Williams will be notified that he may

institute contest against the entry of said Lemmons, with the view to securing the cancellation of the same, on the ground of waiver and abandonment, as set out in his affidavit accompanying his motion for review. Should he establish the facts to be as stated by him in said motion, the entry of Lemmons may then be canceled and Williams allowed to make new entry of the tract. If he has been a settler upon the land as stated by him in the motion, and continues the same, this will be protection to him as against parties other than those to this record.

Under the orders above made, your office is given full jurisdiction of the case, as completely as if said decision of July 12, 1894, now under review, had not been made. Should Williams fail to establish the facts as now alleged by him, that decision will stand; otherwise it may be treated as revoked and set aside, and the case will be adjudicated in accordance with the facts as they may be found.

CONTEST—RELINQUISHMENT—CHARGE OF FRAUD.

LEWIS *v.* BARNARD,
and
WINSTON *v.* BARNARD.

A charge of fraud in the procurement of a relinquishment will not be entertained, as against a record entryman, on behalf of a third party who alleges that he is in possession of a prior relinquishment and intended to enter the land in controversy. The consideration that may have passed between the parties, on the execution of a relinquishment, is not a matter for departmental inquiry, except as an incident, in connection with other facts, tending to show that the entryman was fraudulently deprived of his land.

Fraudulent intent in making an entry is not shown by the execution of a relinquishment, or an offer to sell the improvements on the land.

Secretary Smith to the Commissioner of the General Land Office, February
(J. L. H.) 10, 1896. (P. J. C.)

The land involved herein is the NW. $\frac{1}{4}$ of sec. 5, T. 129 N., R. 56 W., Fargo, North Dakota, land district, of which Sherwood H. Winston made timber culture entry June 25, 1883. On October 22, 1892, his relinquishment was filed and Clarence E. Barnard made homestead entry of the tract. November 4, 1892, Job D. Lewis filed an affidavit of contest against Barnard's entry together with an application to make homestead entry of the tract, and on November 7 following, filed an amended affidavit. He charges that Barnard obtained Winston's relinquishment by enticing him to Britton, South Dakota, and when in an intoxicated condition; that he induced him to make affidavit of the loss of the receiver's receipt of his cash entry, "Barnard knowing such latter fact to be untrue;" that Barnard's homestead entry was for the sole purpose of speculation; that on November 4, 1892, he (Barnard) executed a relinquishment of his said entry; that he is a resident of South

Dakota. He alleges on information and belief that Barnard had used his homestead right prior to the date of his entry. He also alleges that the loss of the receiver's receipt "is false, as he has both in his (affiant's) possession, including Winston's written relinquishment in due form, bearing date July 14, 1892; that he has upon the part of said Barnard, by said acts, been defrauded out of his interest in said land and deprived from making a soldier's homestead entry therefor." He asks that a hearing be ordered, Barnard's homestead entry canceled, "and the relinquishment obtained as aforesaid be declared fraudulent."

The defendant appeared specially and moved to dismiss the contest, for the reason that the affidavit did not state facts sufficient to constitute a cause of action. The motion was overruled, and the testimony was taken before the local offices, ending on March 23, 1893.

On the same day, Winston filed an affidavit of contest against Barnard, alleging that Barnard "made his entry in fraud; that he procured by fraud, without consideration, deponent's relinquishment;" that it was executed and procured by fraud and misrepresentation by said "Barnard to deponent while he was under the influence of intoxicating liquors, to such an extent as to incapacitate him from transacting business;" states that there are one hundred and ten acres in cultivation, and sufficient growth of living trees to allow deponent to make timber-culture final proof; that Barnard's entry is fraudulent and speculative; that deponent has no knowledge or recollection of executing a relinquishment of his entry. He asks that his timber-culture entry be reinstated and Barnard's homestead entry be canceled. Defendant also demurred to this affidavit on the ground that it did not state facts sufficient to constitute a cause of contest.

By your office letter of April 11, 1893, a hearing was ordered on Winston's charges, part of the testimony being taken before the local officers and part by deposition.

The local officers consolidated the two cases, and recommended that the homestead entry of Barnard be canceled, and the timber-culture entry of Winston be reinstated. On appeal, your office, by letter of July 23, 1894, affirmed the action below, whereupon Barnard prosecutes this appeal, assigning several grounds of error, both of fact and law.

The issues raised by the affidavits of contest filed by Winston and Lewis against Barnard's entry, and which have been consolidated into one contest, without objection, are: (1) the procurement of Winston's relinquishment while he was in a state of intoxication, and (2) Barnard's fraudulent or speculative entry. The other matters alleged may be treated as surplusage, and do not constitute grounds for contest. For instance, the allegation of Lewis that he has been defrauded by Barnard, because he (Lewis) intended to make a homestead entry of the tract, is not such a charge as will be inquired into. (*Hamilton v. Harris et al.*, 16 L. D., 288; same, on review, 20 L. D., 227.)

There is no controversy apparently between Lewis and Winston.

Lewis holds a relinquishment by Winston of the same land, executed in July, 1892, and delivered to one Yaiser from whom Lewis procured it. This relinquishment has never been presented to the local office, and is not in the files. It not having been presented, the Department will take no notice of it, except as evidence in the case. This controversy as it now stands might well be entitled *Lewis and Winston v. Barnard*.

The testimony shows that Winston had a timber-culture entry on the tract; that he had complied with the law in relation to that character of entry, and had ten acres of trees growing thereon in the ninth year after his entry, and, it is claimed, could have made final proof on the same. It is shown that he was a man given to drinking, and on all convenient occasions would get intoxicated. It is claimed that he was so intoxicated when he executed the relinquishment that Barnard filed as to be incapable of transacting business, and that Barnard and his partner, Gorman, were instrumental in getting him in this condition for the purpose of getting from him the relinquishment.

Frank Winston, son of Sherwood, testified that about eleven o'clock P. M., on October 21, his father passed his place on his way to Britton, South Dakota, in company with Barnard, "so intoxicated that he did not know me." He did not see his father after that, yet he says, it is a fact that he was intoxicated when he signed the relinquishment.

Sherwood Winston in the Lewis case testified, that he could not tell exactly when it was that he accompanied Barnard to Forman: "he claimed that I had better go down there and let him have this land of mine to save it from losing it to Mr. Yaiser, who, he said, was going to get it away from me." Barnard "was in quite a hurry to get to Britton before Mr. Yaiser would miss me at Forman, and that he could make arrangements to get around before Mr. Yaiser. I was intoxicated." He says he had been drinking so hard that he could not tell what the paper was; and that he was so much so as to be unable to transact business when he signed the relinquishment. He thinks it was before noon that he executed it, had been drunk all night; drove from Forman to Britton, and arrived there about midnight. On cross-examination, he says he talked with Barnard about executing the relinquishment before he left Forman, after talking about it, went to Britton, about twenty miles away. It was probably nine o'clock A. M., when he made the relinquishment. "I was pretty full to know anything." It was executed before McCoy in some office. On re-direct examination, he was asked if he stopped at his son's while *en route*, etc., and his reply was: "We stopped at my son's place going down. It was about 18 miles from Britton. I was intoxicated. I did not know him." Says he continued to drink up to the time he "executed some papers," and that the liquor was furnished by Barnard and Gorman. On re-cross examination, says: "it may have been about ten o'clock or a little later," when they got to his son's house; that they remained there "only a very

short time. About five minutes;" then went directly to Britton, arriving there about midnight. "It might have been between that time and half past one. We had a good team and drove pretty fast." Says he merely guesses at the time of their arrival. "We stopped at the Arlington house. The place was not opened for customers, the man was just moving in. Barnard and Gorman had a room there and we all stopped there, in the same room."

In his own case against Barnard, Winston testified that he relinquished the land to Barnard, who "carried out the idea" to him that it would be the best way to save his land; that Yaiser was trying to get it away from him, and beat him out of it, and at the time this happened he was under the influence of liquor and took his advice; that they commenced drinking at Forman, and started in a buggy for Britton; they "had liquor with them and drank considerable all the way down." Gorman was with them. He does not remember to have had any conversation with them about the land prior to that day. Says he was intoxicated all the time; had never agreed to it when he was sober. "They told me that Mr. Yaiser was going to beat me out of my claim, but I can not say for certain as to that." He was asked if he read over the relinquishment before he signed it, and says: "I could not read it. I got the lawyer to read it to me;" he "was too blinded with liquor" to read it. He did not take any legal advice relative to his relinquishment until spring, when his son came to him. He did not do this sooner, because "I supposed that they meant just what they told me, and that they were doing it for my benefit, and I did not realize until some of my friends told me." Says he was not drunk all winter. He spent the winter in Britton, Gorman and Barnard paying his board. Did chores for them and looked after their stock; says he was drunk all the time, obtaining liquor from them. He received no consideration for the relinquishment. On cross-examination he says, they began to drink a couple of hours before they left Forman; thinks it was about two o'clock A. M. when they got to Britton; got up about seven, "had a few drinks," and went to the lawyer's office in the forenoon; there was some talk about the relinquishment; McCoy drew it up, and read it to him at his request. It is shown in this cross-examination the witness had made a relinquishment, or a mortgage, he claimed he could not tell which, to Yaiser in July, 1892.

The testimony of his son is substantially the same as before. He again says his father "was too intoxicated to know me, his own son," when he passed his house that night.

The witness Chase in his deposition says, that he saw Winston October 21, at his hotel in Britton (the "Commercial"), and he stopped there about one week, and that he was intoxicated during that time. Finch, in his deposition, says he saw Winston on the 21st in Britton, and that he was so badly intoxicated that he staggered.

This is all the testimony there is on behalf of the contestants as to

Winston's being drunk at the time he executed this relinquishment. The evidence of the last two witnesses does not fix the time of the day at which they saw him drunk, whether before or after nine o'clock A. M., about the hour Winston says he executed the paper. Hence their testimony is of little value.

But from Winston's own evidence it is clearly apparent, whatever may have been his condition on October 21st, that before he left Forman he knew perfectly well what he was going to Britton for. He tells what he was going there to do, and the purpose he had in view; he goes into some detail about the journey, the time they started, when they arrived at his son's house, when they got to Britton, where they stopped, the hour at which they went to the lawyer's office in the morning; that the relinquishment was there drawn up, read to him by the attorney, and executed. It does not seem as if a man could be intoxicated to the extent of rendering him incapable of doing business, and yet give all these details with such exactness. He says he did not know his son when he passed his house. Without desiring to be hypercritical, it might with propriety be asked, how he knew he did not know his son, if he was insensible from intoxication. He apparently knows everything else in connection with his journey, even to the purpose for which he was making it. His testimony does not impress me with the fact that he was incapacitated. The testimony of his son on this point is of but little value. He simply asserts that his father was so intoxicated that he did not know him. He does not tell what transpired to convince him of that fact.

But aside from the doubt created by contestant's testimony, there is evidence on behalf of the defendant that can not be overlooked. Both Barnard and Gorman testify that he was not intoxicated at any time during the negotiations or at the time he signed the papers. They admit that they had liquor with them on the trip, and that all of them drank of it, but swear that Winston was perfectly sober. In addition to their evidence, are the depositions of C. A. Dwight, who witnessed the execution of the relinquishment, and J. H. McCoy, who was then county judge and made out the papers. The testimony of these witnesses seems to have been overlooked both by your office and the local office; at all events, it is not referred to at all.

Dwight says the relinquishment was signed between eight and nine o'clock in the morning, and that Winston was perfectly sober at that time. McCoy says Barnard, Gorman and Winston came to his office about eight o'clock A. M., and desired a relinquishment drawn; that at Winston's request he drew it; that Winston stated to him that he had lost his receiver's receipt. He says: "He appeared perfectly sober and in his right mind; he was not intoxicated in the least; the relinquishment was fully read over to him by myself before he signed it." He says he frequently saw him during the next two months and talked with him in regard to it, "and from that talk I can positively say that

he knew just what he was doing when the relinquishment was signed, and he always expressed himself as being satisfied."

It seems to me that this evidence fairly shows that Winston was sober at the time of the execution of the papers.

His charge that the relinquishment was without consideration is not such a charge as the Department will consider, except, perhaps, as an incident in connection with others to show that the claimant has been defrauded out of his land. The relinquishment runs to the government, and it can not inquire as to any consideration that may have passed between the parties. This is a matter they must settle between themselves. But notwithstanding this, it is quite apparent that there was a consideration paid to Winston by Barnard. The latter says he paid bills for him amounting to \$100, also his board for the winter of 1892-'93, amounting to \$100; that he bought clothes, underclothing, shoes, and tobacco, and "gave him a little spending money." His testimony as to the board is corroborated, in part at least, by the proprietor of the hotel where Winston boarded, who swears that Barnard paid him for Winston's board at the rate of \$5.00 per week, from November 26, 1892, to February 6, 1893. Whether the amount he testified to was an inadequate consideration is not for the Department to determine, perhaps, but in view of the fact that Winston had then outstanding another relinquishment, from which he apparently expected nothing, as he was anxious to give another to some person who would give him something, it would seem as if he were not in a position to be heard on the plea of no consideration.

The only testimony in the record on the plea of fraud or speculation on the part of Barnard in making the entry is, that he executed a relinquishment of his entry November 2, 1892, and agreed to sell the improvements for \$550.00. When the relinquishment was presented at the local office, the Lewis contest was found to be pending, and, as entry could not be made, it was subsequently returned to him. The fact of the execution of a relinquishment or the offering for sale of improvements is not an evidence of fraudulent intent in making an entry. (*Chatten v. Walker*, 16 L. D., 6.) The defendant since entry has built a frame house, fourteen by twenty-four feet, ceiled inside, shingled and partitioned off into two rooms; a barn, sixteen by twenty-four, shed roof, with stalls for eight horses; also another barn, covered with straw, for four horses, and dug a well fifteen feet deep. In addition, he had replowed about seventy acres of ground and put it in wheat.

It may be added that there was no testimony offered on the charge of Barnard's disqualifications.

Your office judgment is, therefore, reversed, and the contests will be dismissed.

SWAMP LAND GRANT—CHARACTER OF PROOF.

STATE OF OREGON ET AL. v. PORTER.

The classification of land as swamp and overflowed, that is not at the present time of such character, requires clear and convincing proof of its swampy condition at the date of the grant.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (J. I. H.) (J. L.)

The land involved in this case is the SW. $\frac{1}{4}$ of section 34, T. 23 S., R. 31 E., Burns land district, Oregon. In the year 1873, and again in 1885, the State of Oregon selected and claimed said tract under the swamp land grant of March 12, 1860. On December 7, 1889, Baxter R. Porter made homestead entry No. 61 of the tract. Between September 15, and October 13, 1892, a hearing was had in accordance with the circular of December 13, 1886 (5 L. D., 279). Attorneys for the State of Oregon and Miller, and for Porter attended.

On March 28, 1893, the receiver found that the tract was not swamp and overflowed land rendered unfit thereby for cultivation, and recommended that the State's claim be rejected, and that Porter be allowed to perfect his homestead entry. On July 20, 1893, the register found that the tract was such swamp and overflowed land, and recommended that it be certified as such to the State.

On July 13, 1894, your office affirmed the decision of the register, and held Porter's homestead entry for cancellation. Porter has appealed to this Department.

It is shown by a clear and palpable preponderance of the testimony—indeed it is not seriously disputed—that said tract of land is now, and for more than ten years has been, a gently sloping and slightly undulating meadow, producing plentiful crops of valuable hay which have been harvested every year; and has, since July 1888, furnished for Porter and his family a good living and a comfortable home.

To prove notwithstanding, that the tract was on March 12, 1860, swamp and overflowed land rendered unfit thereby for cultivation, the representatives of the State of Oregon introduced and examined nine witnesses. Two of them, Thomas N. Lofton and C. S. Grigsby, testified that between the months of June and September 1862, the whole of Harney Valley was covered with water. It is a historical fact—developed by these same witnesses and many others in contest cases before this Department—that the year 1862 was a season of phenomenal waterfall, amounting almost to a deluge over the whole Pacific slope from the crest of the Rocky Mountains to the sea, and from British Columbia to Mexico. (*DeWitt v. State of Oregon et al.* 21 L. D. 256.) The quarter section in contest was probably covered with water during the whole summer of 1862. One of said witnesses G. W. Anderson,

first knew the valley in 1874; three of them, J. S. Devine, E. P. McCormack, and J. C. G. Byer, in the year 1876; another one, C. G. Frye, in 1878; the other two came in later, in the year 1883 or 1884. The testimony of all of them tends to show that after the year 1874, Harney valley began to fill up with settlers, and to be cultivated and improved, and made more productive, and more desirable as a place of residence, from year to year. All the testimony shows that the valley including the tract in contest is overflowed annually, from the time the snow on the mountain begins to melt until about the first of July; and that without such overflow the meadows would be arid and valueless.

The first one of seven witnesses produced by the entryman, (M. S. Riggs, by name), testified that in September 1845, he spent five days in Harney valley, travelling with an immigration party, and hunting horses that went astray. That he and his party went up the west fork of Silvies river; and that he, (then twenty years and eight months old), while hunting the horses, traversed a considerable portion of the valley, and the meadows now classed as hay-lands. That he travelled on horseback. That the whole of Harney valley was then dry; as dry as it had been during any of the years between 1888 and 1892: That he saw no water except in the bed of Silvies river: That he encountered no mud or miry places: That he had no difficulty in riding anywhere on his horse, after the other horses that had strayed from the caravan. This witness was not impeached, nor was any attempt made to contradict his testimony.

The other six witnesses for the entryman concur in testifying that since the year 1884, the tract of land in contest has steadily improved in productiveness, and desirability as a place of residence. One of them, Wm. R. Gradon, a civil engineer, who had run two lines of levels across the tract, proved that it has a gradual slope or fall from the north line towards the south and west, of three feet six inches per mile.

This Department can not infer that Harney valley was a swamp in the year 1860, from the fact that it was flooded in 1862. A circumstance very close to the tract of land in contest, verified as a fact by the records of your office, will show the impropriety of such an inference. The exterior lines of township 23 and 24 south of range 31 east, were surveyed on August 25, 1873. The approved map shows that on that day Silvies river, (which was the boundary of the Malheur Indian Reservation), traversed township 23 from northwest to southwest, and entered township 24 near the corner of sections 1, 2, 35 and 36; or to speak accurately according to the survey, at a point three chains or one hundred and ninety-eight feet west of said corner. The sectional subdivisions of township 24, were surveyed between October 15 and 25, 1875. The approved map shows that at the latter date, Silvies river had within two years and two months, been moved westward one mile, and then entered township 24, west of the corner of sections 2, 3, 34 and 35.

To explain this apparent phenomenon, the surveyor in 1875, made the following field note:

I find that in running the section lines between sections 1 and 2, and 2 and 3, I intersected what appeared to be a channel of Silvies river, which when the boundary of the reservation (the Malheur Indian) was run, must have been taken for the main channel of the river. This channel (meaning the channel surveyed and measured by him in 1875), appears to have been formed since the exterior lines of this township were run, when the deputy surveyor made the intersection on the north boundary of section 2, at 77 chains (from the northwest corner of section 2).

And on further examination I found what appeared to be a drift above the township line in Silvies river which had been formed since the exterior lines were run, and hence turned the channel so as to cause it (the river) to make about one mile westing, crossing the township line on the north boundary of section 3.

The existence of the drift or obstruction found by the surveyor in 1875, is corroborated by the witnesses who testified in 1892. J. S. Devine (for swamp land claimant) testified:

There is a slough of Silvies river flows along the eastern boundary of section 34, . . . about half a mile from the eastern boundary of this claim, I think. (Questions, nineteen direct and eight cross ex.).

Charles Nelson (for entryman) in answer to direct question seventeen testified as follows:

In the fall of 1885 or 1886, I and Tom McCormack went down along the river, and found a dam in the river where used to be the old river. In the SE. $\frac{1}{4}$ section 34 was a dam which prevented the water going down the river. It was timber, brush, logs and old hay; which I believe the dam had been there a good many years. The river was about all growed together above, so you could hardly see a sign of the river, which was filled up with old trash, dead cattle, which jammed up the said dams. Bones settled down to the bottom of the river, and mud washed and settled down amongst them bones which make good rich soil. Tule begin to grow and fill the river up entirely, pretty near. The river has been filled up for a mile and a half by the cause of dams; and said old dead cattle, make the tule grow in the bottom of the river; which the water hardly have any outlet where it used to have. In the spring when the melting snow comes down, there is no outlet for it in the channel of the old river; it is bound to flow over the bank and in the direction to said land, or the way the country leans.

W. R. Gibson (another witness for the entryman) in answer to question nineteen, testifies as follows:

As I stated before I never saw this dam (meaning a particular dam); but there has been an obstruction in the river there, that has caused the channel to fill up, and grow over with tule; till a man can drive right across the river there today, with a wagon and team and not know that there is any river there.

No attempt was made to impeach or contradict either of said witnesses.

It does not appear certainly, whether the drift or obstruction discovered by the surveyor in 1875, was natural and accidental, or artificial and intentional. In either case the effect would be to swamp some of the meadows, and to fill up and obliterate the old channel of the river.

It would not be safe to infer the condition of the SW. $\frac{1}{4}$ of section 34,

in the year 1873, from its actual condition in 1875 and afterwards. One hundred and sixty acres of meadow lands would probably be in some way affected by the removal bodily of a whole river from the neighborhood of a mile and a half, to the nearness of half a mile. So also, this Department cannot infer that Harney valley was a swamp in 1860, because it was flooded in 1862; especially in view of the fact that it was very dry in the year 1845.

When after the lapse of more than thirty years,—after the death of a generation of men—persons claiming to be assignees of the State of Oregon, go out to search for lands which were swamp and overflowed in 1860, they must expect to find the burden of proof aggravated, but not shifted: Especially if the lands they may select, be now not swamps, but the productive farms and healthy homes of industrious citizens.

The State of Oregon and Henry Miller have failed to prove that the SW. $\frac{1}{4}$ of section 34 now in contest, was on March 12, 1860, swamp and overflowed land made unfit thereby for cultivation. Your office decision is hereby reversed. The State's claim will be rejected; and Porter's homestead entry will be held intact.

JURISDICTION OF THE COMMISSIONER—APPLICATIONS TO CONTEST.

MEYERS v. MASSEY.

It is properly within the jurisdiction of the Commissioner of the General Land Office to review and revoke a decision of his office that is not final on the merits, and from which no appeal will lie.

The allowance of an application to contest a final entry is a matter resting in the sound discretion of the Commissioner, and the denial thereof will not be disturbed unless an abuse of such discretion is made to appear.

It is properly within the discretion of the Commissioner to deny a hearing on an affidavit of contest corroborated by a witness who has been convicted of perjury in making said corroboratory affidavit.

Secretary Smith to the Commissioner of the General Land Office, February 10, 1896. (C. W. P.)

It appears by the record that on February 23, 1891, the defendant, George N. Massey, made homestead entry, No. 424, of the NW. $\frac{1}{4}$ of section 34, T. 12 N., R. 3 W., Oklahoma land district, Oklahoma Territory, and on August 6, 1893, commuted said entry to cash entry No. 615; that on May 26, 1891, the plaintiff, John A. Meyers, applied to enter said land, and his application being rejected for conflict on June 6, 1891, he appealed alleging in his appeal the disqualification of Massey; that on December 7, 1892, Meyers filed a second affidavit of contest, alleging the disqualification of Massey by reason of premature entry into the Territory; that his entry and final proof were made for speculative purposes, and not in good faith to secure a homestead, and that he (Meyers) had settled upon the land on May 10, 1889, and had

since resided upon and claimed the tract as his homestead; that in said affidavit the charge of premature entry was made upon information and belief, and the other charges as within the knowledge of the contestant; and that the corroborating witness to said affidavit of contest was James E. Rose, who swore that "he knows of his own personal knowledge" that the allegation of premature entry is true, and as to the other charges that they "are true as he is informed and believes;" that on December 29, 1892, Rose filed an affidavit asking that his corroborating affidavit be modified, as the facts intended to have been sworn to by him were all upon information and belief, and it was thereupon held by your office that the affidavit filed June 6, 1891, was insufficient, being uncorroborated; and as to the second affidavit, filed December 7, 1893, it was held, that the allegation that Massey's entry was made for speculative purposes is too general to serve as the basis for an investigation, and that his allegation of prior settlement came too late on May 26, 1891, to affect the entry of Massey, who had a preference right of entry under his contest against the prior entry of William J. McClure, made April 30, 1889, and canceled by relinquishment on February 18, 1891, when Massey's homestead entry, No. 424, was made; and, besides, Massey's entry was more than three months old, when Meyers made such application, and hence the latter was barred, under the third section of the act of May 14, 1880, (21 Stat., 140); and hence all Meyers' allegations in regard to his personal qualifications for making a homestead entry were immaterial; that the only material averment, therefore, is the one charging that Massey was disqualified from making an entry, because he had entered the Territory during the prohibited period, and that one is sworn to upon information and belief, and corroborated upon information and belief, and, consequently does not constitute a sufficient cause of action; that Meyers filed a motion for review of your office decision of April 7, 1894, and filed the affidavits of George H. Lacy and Charley J. Blanchard to the effect that Massey had been within the Territory during the prohibited period; that on June 20, 1894, Lacy's affidavit was filed in your office, asking that his corroborating affidavit be withdrawn, alleging as a reason, therefor, that he was mistaken as to the identity of the person; that your office on August 6, 1894, held that Meyers' application to contest, as amended by Blanchard's affidavit should be allowed, but held in abeyance until the decision of Graham's appeal then pending; that on August 10, 1894, Massey filed a motion for review of said decision, and on October 12, 1894, the motion was denied. On January 18, 1895, the attorney for Massey filed in your office a petition, asking that your office exercise its supervisory power, and set aside the decisions of August 6, 1894, and October 12, 1894, for the reason that after said dates, the said John A. Meyers and Charley J. Blanchard had been indicted, convicted, and sentenced to five years in the penitentiary, for perjury committed in the matter of making and corroborating said contest affidavit. To said petition

were attached certified copies of indictments and judgments. No action was taken thereon, further than to suspend action on Meyers' application to contest, until that of Graham was finally disposed of. On August 8, 1895, the Department affirmed the decision of your office, dated March 3, 1894, denying Graham's application. On February 4, 1893, Meyers filed an answer to the petition of Massey to set aside your office decision of August 6, 1894, and October 12, 1894, accompanied by his own affidavit and an affidavit of J. L. Brown, attorney at law. On August 23, 1895, your office rendered a decision on Massey's motion for a review which is as follows:

By letter "H", of April 7, 1894, it was determined that, of all the charges made by Meyers, that of premature entry on the part of Massey, was the only material averment, and the one on which hearing could be ordered.

By letter "H", of August 6, 1894, it was determined that such a showing had been made as would warrant the ordering of a hearing on the said charge of premature entry. The said decision was adhered to by letter "H", of October 12, 1894, and while under the conditions then existing, the showing made was thought sufficient, conditions have since arisen which would warrant the vacation of said decision by this office, on its own motion.

Since the dates last named, Meyers, the contestant, and Blanchard, his corroborating witness, have been tried, convicted, and sentenced, for the making and corroborating of said contest affidavit. It may be, as alleged by counsel for Meyers, that the said parties were not given a fair and impartial trial, but as to the administration of a court of justice, it is not for this office to question the regularity thereof.

The plaintiff's allegations are verified and the verification is corroborated for the purpose of satisfying this office, or the local officers, as the case may be, of the good faith of the contestant. Where, as in this case, both the plaintiff and the corroborating witness have been convicted of perjury in swearing to the affidavit of contest, it is clearly within the discretion of the officers to whom the application for a hearing is addressed, to refuse to grant it. For while their conviction does not disqualify them, as witnesses, nor establish the truth of the charge, yet it is competent evidence in this case for the purpose of impeaching their reputations for truth and veracity, and when considered for this purpose, and in connection with the fact that the Hon. Secretary has heretofore discredited Blanchard (See 13 L. D., 69), it is insufficient to satisfy this office of the probability of the contestants' being able to sustain his charges, and especially is this true in view of the fact that this entry has been several times contested on the same charges made by the plaintiff herein, which contests have been withdrawn by the contestants.

Meyers' application to contest is, therefore, dismissed, subject to his right of appeal.

Meyers has appealed to the Department.

The grounds of appeal are as follows:—

1. The Honorable Commissioner having ordered a hearing in the above matter, and the defendant, Massey, having filed his motion for review, and the same having been denied, and the order for a hearing having been left in force, it was not competent for the Honorable Commissioner thereafter to entertain or allow a further action thereon, by what is called a petition, or otherwise. Under the Rules of Practice the motion for review ended the matter, subject only to the right of appeal to the Honorable Secretary of the Interior; and it was error for the Commissioner to hold otherwise.

2. The Honorable Commissioner of the General Land Office erred in refusing to order hearing for the reason that there had been a conviction of contestant Meyers

and Blanchard, when such conviction was not had in a court of final resort, and, in not awaiting the results of appeals in said cases, because if reversed on appeal, then the order for a hearing should stand, and if a hearing be denied and a patent be issued to Massey for the land, and then the judgment of conviction be reversed, contestant's rights would all be lost.

3. The Honorable Commissioner erred in holding that a conviction for perjury in a court of record is ground for refusing a hearing in a land contest case, pending in the land department.

4. The Honorable Commissioner erred in holding that Meyers had been convicted of perjury of swearing that Massey was a "sooner", when such is not the judgment of record. The record shows that the United States side of the territorial court convicted Meyers for perjury, in swearing that he (Meyers), was a prior settler on the land, the very thing the land department had held, and still holds to be wholly immaterial, and on which no conviction for perjury could legally be had, and in this the Honorable Commissioner erred.

The first ground taken is that your office had not the right to reconsider and reverse your office decisions of August 6, 1894, and October 12, 1894. But it is clear, that these decisions not being final on the merits, but upon a question within your discretion and without appeal, you had the right to revoke them and refuse a hearing. (*Jones v. Campbell*, 7 L. D., 404; *Ravezza v. Binum*, 10 L. D., 694.)

The question is then upon your refusal to order a hearing on Meyers' affidavit of contest, filed December 7, 1893.

Under rule 3, of practice, the granting of an application to contest a final entry rests in the sound discretion of the Commissioner of the General Land Office, subject to appeal to the Department, in cases where it is denied, and his judgment will not be interfered with, unless an abuse of discretion is made to appear. (*Gray v. Whitehouse*, 15 L. D., 352; *Johnson v. McKeurley*, 16 L. D., 152).

I have examined the record in the case of United States against John A. Meyers and United States against Charley J. Blanchard, which are annexed to Massey's petition; and, while it appears that the indictment against Meyers is founded upon the allegations contained in his contest affidavit, which were denied by the decision, of your office, the indictment against Blanchard charges him with perjury in swearing to Meyers' affidavit of contest, alleging that Massey had entered upon and occupied lands in Oklahoma Territory on the 22d day of April, 1889, prior to 12 o'clock, noon, in violation of law. It was upon this corroborating affidavit of Blanchard, that your office ordered a hearing. It now appears that the corroborating witness has been convicted of perjury in making this very affidavit. The affidavit of contest is in the nature of an information, and the requirement (rule of practice No. 3), that it shall be corroborated by one or more witnesses is not a mere idle ceremony; but its purpose is to guard against contests, initiated by irresponsible persons in bad faith. In the case of *Patterson v. Massey* (16 L. D., 391), it is held that if the charges in an affidavit of contest are based upon information and belief they must be corroborated by one or more witnesses whose statements must rest upon facts within their knowledge.

In the case at bar the corroborating witness has sworn that the facts upon which the affidavit of contest is based are within the actual knowledge of the affiant, and he has been convicted of perjury in making the affidavit. Can it be said that it was an abuse of your discretion to reject the affidavit of contest under such circumstances?

It is alleged that neither Meyers nor Blanchard had a fair and impartial trial in the district court of the Territory, and it is urged that these convictions not being by a court of final resort, your office erred in not awaiting the result of appeals in the cases. But it is not alleged that appeals have been taken or were intended to be taken to the supreme court of the Territory, and the judgments of the district court were final judgments until reversed on appeal.

For these reasons I can not think that it was an abuse of your discretion to refuse a hearing on Meyers' affidavit of contest.

The judgment of your office is accordingly affirmed.

HOMESTEAD ENTRY--RELINQUISHMENT--TRANSFEREE.

GARTLAND *v.* MARSH ET AL.

The right of one claiming under a mortgage and purchase of a tract for which final certificate has been issued, but is thereafter canceled, can not be recognized as against a subsequent entry, made on the relinquishment of the prior claim, if it does not appear that the intervening entryman was a party to, or had knowledge of the alleged fraud upon said incumbrancer.

Secretary Smith to the Commissioner of the General Land Office, February (J. I. H.) 10, 1896. (P. J. C.)

The land involved in this controversy is the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 28, Tp. 139, R. 58, Fargo, North Dakota, land district.

The early history of this tract, and the connection of the several parties therewith, is set forth at length in 16 L. D., 140. It is not deemed necessary to repeat it here any further than to say that O. L. Rosenkrans claimed the right to the land by reason of having a mortgage thereon given by L. D. Marsh, and having also purchased his right thereto. Marsh never made final entry of the same, but subsequently to the transactions with Rosenkrans, and when the records of the local office showed the land to be subject to entry, Marsh relinquished whatever rights he had, and Peter J. Gartland thereupon made homestead entry. Subsequently the Marsh entry was reinstated, and as a result of that proceeding the matter came to the Department, where it was determined that a hearing was necessary. This is the language used by my predecessor in defining the rights of the parties, and the purpose for which the hearing was ordered:

While the rights of a *bona fide* purchaser or incumbrancer after certification may be protected, notwithstanding a subsequent relinquishment by the entryman, yet, if

an entry is relinquished prior to the issuance of final certificate and a *bona fide* entry of the land is subsequently made by another, the claim of such incumbrancer will not be protected as against the rights of the subsequent *bona fide* entryman.

In this case a hearing should be ordered to determine whether Gartland was a party to the alleged fraud upon Rosenkrans, or whether his entry was *bona fide* and without knowledge of said alleged fraudulent conduct. If the former, the entry of Gartland will remain canceled and Rosenkrans will be allowed to perfect the entry of Marsh upon the proof submitted, if such proof authorizes the issuance of final certificate, or to submit proof showing that Marsh had complied with the law and was entitled to final certificate. If it be shown at the hearing that Gartland was not a party to the alleged fraud, but made his entry *bona fide*, it should be reinstated and the entry of Marsh canceled.

The hearing was had before the local officers, and they decided that Gartland's "legal right to the tract is clear and unequivocal." On appeal, your office, by letter of July 26, 1894, reversed their action, whereupon Gartland prosecutes this appeal, assigning errors both of law and fact.

Your office finds that "Gartland did not know that Marsh had defrauded Rosenkrans, and he certainly did not enter into a conspiracy or agreement with Marsh for that purpose." Again, it is said in your office letter: "My conclusion is that Gartland did not conspire with Marsh to defraud Rosenkrans." On this finding of fact your office concurs with the local officers, and from an examination of the testimony I am satisfied that this is correct.

This finding of fact, it seems to me, was sufficient of itself to call for a judgment in favor of Gartland. The hearing was for the purpose of determining "whether Gartland was a party to the alleged fraud upon Rosenkrans, or whether his entry was *bona fide* and without knowledge of said alleged fraudulent conduct," and the evidence conclusively shows that he was not a party to and was without knowledge of it, as found by your office.

It is said by your office letter that Gartland "could very easily have learned of Marsh's fraudulent conduct by an examination of the land records of the county." It is not apparent how he could have learned of any "fraudulent conduct" by this method, as it is not disclosed by the record. The most he could have ascertained was that there were mortgages on record. But under the circumstances as disclosed by the records in the local office, he was not bound in any way to take any notice of these, because in 1886 Marsh's final proof had been rejected, and the case closed. Marsh was then, and subsequently, a resident in the vicinity of the land, and had been for a number of years before, had been recorder of deeds of the county, and the record showed that he had received notice of the rejection of his proof. Under these conditions, the entryman was not bound to take notice of the county records for the purpose of discovering "fraudulent conduct," or otherwise.

Your office judgment is therefore reversed, the entry of Marsh will be canceled, and that of Gartland reinstated.

TOWNSITE—ENTRY—DATE OF FINAL CERTIFICATE.

ROSS v. HETRICK.

The irregular allowance of a townsite entry prior to the submission of the final proof therefor does not make the entry for that reason void, but voidable only; and the defect being subsequently cured the entry must bear the date of the original action.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 10, 1896. (E. E. W.)

On the 3d of October, 1893, H. C. Hetrick applied for deed to lot 19, of block 41, in Alva, Oklahoma, alleging settlement, improvement and possession; and on the 12th of January, 1894, A. J. Ross filed an affidavit of contest, denying the allegations contained in Hetrick's application, and alleging improvement and occupancy of the lot himself.

At the hearing Hetrick moved to dismiss the contest on the ground that the trustees were without jurisdiction. The trustees overruled this motion, and heard testimony as to Hetrick's occupancy, but refused to hear testimony as to Ross' occupancy, and on the 5th of February, 1894, dismissed the contest and awarded the lot to Hetrick. Ross appealed, and on the 15th of June, 1894, the Commissioner of the General Land Office reversed the decision of the trustees, holding that Hetrick was not an occupant of the lot at the date of the townsite entry, and, therefore, not entitled to deed; and directing the trustees to allow Ross to submit evidence of occupancy at the date of the townsite entry. Hetrick then appealed to the Department.

The testimony submitted by Hetrick shows that he took possession of the lot about 1:50 p. m., September 16, 1893, and camped on it nine or ten days. During this time he built a "sort" of fence across the front end of the lot, and dug a hole about three feet in diameter and eighteen inches deep, which he says was the beginning of a well. After filing his application for deed on the 3d of October, he returned to his home in Kansas, and had not further occupied or improved the lot at the date of the hearing.

In his affidavit of contest Ross does not specify the date of his improvement, but in an affidavit of continuance filed on the 3d of February, 1894, he swears that his witnesses, Goodwin and Zimmerman, if present, would swear that the date was the 12th of January, 1894.

The Commissioner of the General Land Office also found from the records of his office that the trustees applied to enter the townsite of Alva on the 26th of October, 1893, and received final certificate as of that date. But final proof was not made until the 18th of December, 1893, and the Commissioner decides that—

Inasmuch as the cash entry should not have been allowed till after final proof had been duly made, the date of said final certificate was error, and the correct date of entry of the townsite of Alva, O. T., is held to be December 18, 1893, the date of submission of final proof.

This part of the Commissioner's decision is erroneous. The entry may have been irregularly allowed by the register and receiver on the 26th of October, but the entry was not for that reason void, but at most only voidable, and as the defect was afterwards cured, the date of actual entry, October 26, 1893, is the correct date, notwithstanding the irregularity, and the Commissioner's decision on that point is modified to conform to this view.

The decision of the Commissioner that Hetrick was not an occupant of the lot at the date of the townsite entry, and therefore not entitled to deed, and that Ross should be allowed to submit testimony as to his occupancy at the date of the townsite entry, is affirmed.

TIMBER-CULTURE ENTRY—EQUITABLE ACTION.

WILLIAM H. RUSSELL.

A timber-culture entry of a fractional sub-division that embraces less than forty acres, under which the area planted to trees is less than two and one half acres, may be equitably confirmed, where it appears that the entryman followed the construction of the law announced in the general circular of the Department in force at the time of planting, and shows on final proof a greater number of growing trees than is required on the statutory acreage.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 11, 1896. (W. A. E.)

William H. Russell made timber culture entry on May 5, 1882, at the Wichita (now Dodge City), Kansas, land office, for lot 3 of Sec. 14, T. 26 S., R. 1 W., containing 23.70 acres.

February 23, 1894, he offered final proof, which was rejected by the local officers for the reason that the proof showed the cultivation of but one and one-half acres.

On appeal, your office, by letter of August 10, 1894, affirmed the action of the register and receiver, whereupon Russell prosecuted a further appeal to the Department.

The final proof shows that the entryman has planted and cultivated each year since date of entry one and one-half acres of the tract to trees; that he has taken all necessary precautions to insure the growth of the trees; that at the date of offering final proof there were on the land about 4,000 trees—an average of 2,500 to the acre; that these trees, which consist of cottonwood, box elder, and walnut, were in a healthy, growing condition and averaged about four inches in diameter and fifteen feet in height.

Frank M. Dofflemyer, one of the final proof witnesses, who lives on adjoining land and sees the tree tract nearly every day, says, in speaking of the claimant: "He has done the work well and has a fine grove fulfilling the requirements of the law to the letter."

James M. Nicholson, another witness, says: "Trees look well and make a handsome grove."

The only possible point of technical non-compliance with law that could be raised on this showing is in regard to the area planted to trees. The timber culture act of June 14, 1878 (20 Stat., 113), provides that trees must be planted and kept in a proper state of cultivation on "two and one-half acres on any legal subdivision of forty acres or less."

It is shown, however, that the entryman supposed he was complying strictly with the law when he planted only one and one-half acres of the present tract to trees. On page 30 of the general circular of March 1, 1884, also page 144 of the general circular of February 6, 1892, section 12, it is said: "Ten acres are thus to be plowed, planted, and cultivated on a quarter section, and the same proportion when less than a quarter section is entered." Nowhere in the circular is it stated that two and one-half acres must be planted and cultivated where less than forty acres are entered. That provision of the statute was evidently overlooked in the preparation of the circular referred to. Ten acres are one-sixteenth of a quarter section. This proportion holds good by the terms of the statute on an eighty acre tract and a forty acre tract. The present entry covers a little less than twenty-four acres. One-sixteenth of twenty-four is one and one-half. In planting and cultivating to trees one and one-half acres; therefore, Russell was following strictly the instructions of the general circular and honestly believed that he was obeying the law.

Again, in the case of *Male v. Heirs of Quackenbush*, 9 L. D., 567, it was held that "a slight deficiency in the acreage planted will not justify cancellation where a greater number of trees are growing on the land than is required on the statutory ten acres at date of final proof." The timber culture law required the claimant to show 675 living and thrifty trees to the acre at the time of offering final proof. Had Russell planted two and one-half acres to trees as required by the statute, he would have had to show on final proof only two and one-half times 675, or less than 2,000 trees. As it is, he has shown nearly 4,000 healthy trees, twice as many as it was necessary for him to have. The fact that these trees are not scattered over quite as wide an area as they should be, ought not, in all good conscience, to be allowed to deprive him of the fruit of years of honest labor.

This seems to be pre-eminently a case for reference to the board of equitable adjudication. There has been a substantial compliance in good faith with the law and there are no adverse claims.

Your office decision is accordingly reversed, and the entry will be submitted to the board.

SWAMP LAND—AGRICULTURAL CLAIMANT—CIRCULAR OF DECEMBER 13, 1886.

WILLIAMS v. STATE OF IOWA.

The circular of December 13, 1886, requiring the State, after due notice, to present its objections to the allowance of entries of lands theretofore selected, is not applicable to a case wherein a hearing to determine the character of the land was ordered prior to the issuance of said circular, and such hearing has not been held in pursuance of said order.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 11, 1896. (W. F. M.)

On December 15, 1893, Henry M. Williams made homestead entry of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 26, township 96 N., range 36 W., in the land district of Des Moines, Iowa.

By your office letter ("K") of August 13, 1894, the entry of Williams was relieved from suspension on account of conflict with the State's claim under the swamp land grant, and the register and receiver were directed to so advise him. This action was taken in pursuance of circular of December 13, 1886 (5 L. D., 279), under which the State of Iowa had received the required notice, and to which no objection appeared to have been made by the State. On the same day, and by the same letter, the claim of the State, which had on September 21, 1882, selected the lands in controversy as swamp, was rejected.

On September 25, 1894, C. T. Archer filed in the local office a petition, alleging that he bought the land of Clay county, and has been in the possession of the same for over ten years; that the entry of Williams is illegal and contrary to law; that he has a good and sufficient deed for the same from the county of Clay; that he at no time had any notice or information served on him by the said local office or by any other person; that he had no notice of the claim or of his entry until recently; that he has had no notice of appeal, and that the local office had no right or authority to allow the entry, the same being swamp land. He prays that the case be opened; that notice be served on him; that he be allowed to appear, and that a day be appointed for a hearing to determine the character of the land; that the entry be canceled; and that all the papers, together with his petition, be sent to your office.

This was duly transmitted to your office, and by office letter ("K") of October 6, 1894, the action previously taken in the matter was affirmed.

On October 20, 1894, Archer filed in the local office an appeal from the decisions of your office in this matter, and assigned as errors, in substance, his ownership of the land; its vestiture in the State by virtue of the act of September 28, 1850; his open, continuous and notorious possession of the same for more than ten years, and want of notice of any action in connection therewith by the register and

receiver. Furthermore, on the same date he filed in the local office an application to this Department to be permitted to intervene in the matter, and set out as reasons therefor the specifications of error, in an elaborated form, assigned in his appeal; so that there can be no doubt that the whole matter is now before this Department for such action as may be proper to be taken.

These proceedings are resisted by the homestead entryman Williams, who insists upon the non-swampy character of the land; that Archer was not entitled to notice; that due and regular notice was given to the governor of the State and to the auditor of Clay county, within which the land is situated, and that the law and the regulations require nothing further.

The provisions of the circular under which the entry of Williams was allowed, in so far as they have any application to the present controversy, are the first and second paragraphs, as follows:

1. When any settler upon such lands or applicant to enter the same under the public land laws of the United States shall apply to make a filing or entry under said laws, accompanied by a statement under oath corroborated by two witnesses, that the land in its natural state is not swamp and overflowed and rendered thereby unfit for cultivation, the register and receiver will allow such filing or entry "subject to the swamp land claim."

2. Upon the admission of any such filing or entry the register will at once notify the governor of the State thereof, and allow him sixty days within which to object to the perfection of the entry and to apply for a hearing in behalf of the State to prove the swampy character of the land.

It appears that these provisions were strictly observed in the present case, but that the governor made no answer, nor took any action in resistance of the effort of the entryman to have his entry allowed and perfected.

This land was selected by the State of Iowa under the swamp land grant on December 21, 1882, and notification thereof was duly made to the local office and to the General Land Office.

On March 10, 1883, by your office letter ("K") a hearing was directed for the purpose of determining the character of the land in controversy. No hearing has been held, however, in pursuance of this order, nor has any examination ever been made in the field by an agent of your office.

The question presented appears to be, whether or not, if it be true as claimed by Archer that the land was swamp on September 28, 1850, the date of the granting act, such action as the law contemplates has been taken to ascertain that fact, and, further, whether, though the State may be concluded by the proceedings heretofore outlined, its transferee Archer is also concluded. I think both of these propositions must be answered in the negative.

The swamp land grant has been held to be one of the present, vesting an immediate interest, as was said in the case of *W. H. Cushing et al. v. State of Michigan*, 4 L. D., 415, and, as has been repeatedly decided

since, both by this Department and by the supreme court. It was held in that case further, "that the State can not be deprived of it (the land) if it is of the character claimed," and the law undoubtedly contemplated that some adequate effort should be made to determine the character of the lands intended to be granted. I do not think it has been done in this case. The circular of December 13, 1886, *supra*, is not deemed to apply to a case like this, where a hearing was ordered prior to the issuance of the circular, and where it has not been held in pursuance of that order.

Archer's attitude seems to be that of the instrument through which the irregularities of which he complains have been brought to the attention of the Department.

The controlling fact in the case is, that no hearing has ever been held to determine the question as to whether or not the land in controversy is in fact swamp, and such as to pass by the grant. In all cases where such a hearing is required and demanded, it should be granted.

It is, therefore, ordered that a hearing be directed, in pursuance of the views herein expressed, and that all the parties in interest may have notice.

PIERCE ET AL. v. MUSSEY-SAUNTRY COMPANY.

Motion for review of departmental decision of September 5, 1894, 19 L. D., 136, denied by Secretary Smith, February 12, 1896.

WAGON ROAD GRANT—RESERVATION—SUIT TO RECOVER TITLE.

CALIFORNIA AND OREGON LAND CO.

The reservation of specific lands for the residence of an Indian tribe, provided for in a treaty in which it is declared that the terms shall be binding upon the parties when ratified by the Senate and the President of the United States, is operative from the date of signing the treaty, and not from the date of its ratification.

The suit instituted by the government under the provisions of the act of March 2, 1889, was for the purpose of determining whether the rights of the company under its grant had been forfeited for failure to comply with the terms thereof, and the decision therein adverse to the government does not preclude an inquiry on behalf of the United States as to whether a specific tract was actually embraced in said grant.

The right on the part of the government to institute suit for the recovery of title to lands erroneously certified on account of a wagon road grant, exists independently of the act of March 3, 1887, which is limited to railroad grants, and suit for such purpose may therefore be commenced without the preliminary demand required by said act.

Secretary Smith to the Attorney-General, February 12, 1896.

(F. W. C.)

I herewith enclose the papers accompanying a letter from the Commissioner of the General Land Office, dated July 28, 1894, in which he submits in accordance with instructions contained in departmental let-

ter of March 17, 1894, in so far as the large quantity of unsurveyed lands within the limits thereof at this time admits of, an adjustment of the grant made by acts of July 7, 1864 (13 Stat., 355), and December 26, 1866 (14 Stat., 374), to aid in the construction of a wagon road from Eugene City to the eastern boundary of the State of Oregon.

Three lists of land accompany the papers forwarded, being as follows, namely: list "A" covering tracts lying outside the limits of the grant certified on account thereof and partly within the Klamath Indian reservation; list "B," lands within the limits of the grant and certified on account thereof, also within said reservation; and list "C" tracts covered by pre-emption filings subsisting at the date of the grant.

It appears that before submitting these papers, a rule was laid upon the California and Oregon land company, the present owners of the grant, to show cause why steps should not be taken looking to the recovery of title to the lands embraced in said lists, to which the company has made answer and therein insist that its title to the land within the Klamath reservation is perfect and is not affected by the treaty reservation for the Indians, for the reason that at the date of the grant the Indian title was simply that of occupancy, in the nomadic sense in which the entire State was then occupied by roving tribes of Indians, there being at that time no technical reservation with established boundaries.

In answer to this contention I have but to say that a treaty was concluded with the Klamath Indians October 4, 1864, and by article I., the Indians ceded to the United States all their right, title, interest and claim in and to certain country occupied by them, upon the proviso that a certain described tract within the ceded country "shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians and held and regarded as an Indian reservation."

By the 12th article of the treaty it was provided that—"This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States."

It is urged by the company that under this 12th article of the treaty no reservation was created until the treaty was proclaimed which was not until February 17, 1870.

Under the previous administration of this grant by this Department it has been uniformly held that the company's right attached upon the filing of the map on February 28, 1870, showing the definite location of the company's line.

In the Commissioner's report, however, he states—

Since serving said rule a map of the definite location of the entire road filed in this office March 17, 1869, has been discovered, and it is my opinion that this is the date upon which the right of the company should be held to have attached.

I have caused these maps to be examined and find that the map first filed March 17, 1869, was a map of definite location, but that on February 28, 1870, the company filed a second map which shows a partial construc-

tion and varies in some places materially from the line of location shown upon the map of 1869. It appears that this second map has been treated by the land office as fixing the limits of the grant, for the diagram in use appears to have been adjusted upon the corrected line as shown upon the map of 1870.

It seems, therefore, that by its long acquiescence in the map of 1870, under which the rights of conflicting claims have been adjudicated, the company is estopped from claiming any benefit under the map of 1869; but this I deem immaterial to the matter here in question, for I am clearly of the opinion that under the treaty of 1864 the lands included within the reservation therein provided for were, from the date of the signing of said treaty, reserved for the benefit of the Indians as of necessity; for should it be viewed otherwise, it will be seen that it was within the power of others to have gone upon the lands selected for the reservation and thereby prevented effectually the final consummation of the treaty.

It is further urged by the company in answer to the rule, that the reservation as finally surveyed, does not agree exactly with the boundaries prescribed therefor in the treaty. Upon this question there seem to have been some doubt, but as the reservation was established by the proper officers of the government in accordance with the treaty, the same should be respected as established unless error therein is plainly made to appear. The showing made does not satisfy me that any error has been committed, and for the purposes of this suit it must be presumed that the boundaries of the reservation, as surveyed, are in accordance with the treaty stipulation.

In case it should be made to appear to the court, in the event of suit being brought, that the boundaries as established are incorrect, the bill could be amended so as to exclude from the suit any lands improperly included within the reservation, and for that reason held to have been excepted from the grant.

It is finally urged by the company that the entire matter is *res adjudicata*, because, under the act of Congress approved March 2, 1889 (25 Stat., 850), suit was directed to be brought against this company, which suit was decided in favor of the company by the United States supreme court at the October term of 1892 (148 U. S., 131). The decision of the court referred to concluded with the declaration that "The conclusion is clear that the title of the purchasers and the land company is beyond challenge." It is therefore urged that the United States is estopped from setting up any additional claim as against those holding under the wagon road company by the decision of the court just referred to.

The act of March 2, 1889, declared that suit be brought—

To determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the State of Oregon of the

completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be.

It will be seen that these are questions affecting the company's right to lands admittedly included within the grant—that is, admitting the lands to have been granted, has the company's right thereto been avoided. It was not the purpose of said suit to inquire as to which of the specific tracts within the limits of its grant were actually granted, and had the United States in its suit brought under this act, attempted to set out the status of each particular tract within the grant, so far as any question was suggested by the records as to the company's right thereto, the bill might have been justly dismissed for multifariousness.

I am, therefore, clearly of the opinion that the United States is not estopped by the decision upon the bill filed under the act of March 2, 1889, from considering the question as to whether any specific tract included within the company's grant was actually embraced thereby.

When it is remembered that many thousand acres within the limits of the company's grant are yet unpatented, it will be seen that the government still retains jurisdiction to determine which of the lands were actually granted.

From a careful consideration of the entire matter, I am of the opinion that the lands embraced in lists A, B, and C, before described, were erroneously certified on account of the grant, and have therefore to recommend that suit be instituted in the proper court to recover title to the lands so shown to have been erroneously certified, if in your judgment the same can be successfully maintained.

It will be noted that the Commissioner in serving rule upon the land company, laid the same under the act of March 3, 1887 (24 Stat., 556). Said act relates specifically to the adjustment of railroad grants.

Under the provisions of the act of March 3, 1891, all suits brought by the United States to recover title to lands erroneously certified, or patented, will be barred on March 3, 1896, unless said act shall be amended. The act of 1887, before referred to, directs that demand be made upon the company and that ninety days be allowed within which to comply or make answer thereto, before the institution of suit. As before stated, said act is limited to railroad grants, and I am of the opinion that the right of suit exists in the United States independently of the act of March 3, 1887, and for that reason make recommendation for this suit without making demand upon the company, to the end that the same may be instituted prior to the period of limitation, as established under the act of 1891.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

DREW v. COMISKY.

The cancellation of an entry without notice to the entryman is not only unauthorized, but is absolutely void for want of jurisdiction, and an entry so canceled at the passage of the act of March 3, 1891, is in law an existing entry, and confirmed by section 7 of said act, if otherwise within the provisions of said section; and the right of a transferee in such case is not limited to the privilege of showing that the entryman had in fact complied with the law.

The confirmation of an entry by said section for the benefit of a transferee is not defeated by want of good faith on the part of the entryman or his immediate transferee, if subsequently, and prior to March 1, 1888, the land is sold to a bona fide purchaser; nor is such purchaser bound to take notice of a prior order of cancellation that is void for want of jurisdiction.

The case of *Castello v. Bonnie* (on review) 20 L. D., 311, overruled.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 17, 1896. (G. B. G.)

The land involved herein is the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 59 N., R. 17 W., Duluth land district, Minnesota.

August 18, 1882, William Comisky made pre-emption cash entry for the above described land, and on June 15, 1883, this entry was canceled on the report of a special agent, that the entry was fraudulent, and that the entryman had never resided upon or improved the land, and it was directed by your office that sixty days be allowed in which to show why the entry should be reinstated. Notice was sent to Comisky at his last known address advising him of the action taken. No response thereto was made by him, but on August 20, 1883, John Comstock, an alleged transferee, filed a petition asking that a hearing be ordered to allow him to show cause why said entry should be re-instated.

The local officers denied said petition, but on Comstock's appeal therefrom, your office after nearly five years unexplained delay, on February 15, 1888, ordered a hearing to allow the said transferee to appear and submit his testimony "showing a compliance with the law by the entryman and the validity of the entry."

The trial was had November 25, 1888, at which the government, by its special agent, and the C. N. Nelson Lumber Co., a subsequent transferee, appeared. The transferee moved for a dismissal of the cause, claiming that Comisky had not been properly notified of the cancellation of his entry, and that the local officers were without jurisdiction to hear the case. The motion was overruled, exceptions saved, and the trial proceeded, both the government and the C. N. Nelson Lumber Company adducing testimony.

February 8, 1889, the local officers rendered their decision, finding—

In this case the transferee is the only party in interest, having deeds indirectly and through intermediates of the whole interest of the claimant to the land.

It is clear from the proof that the claimant never resided upon, nor made any improvements upon the land, and that he filed upon the same under contract to make absolute conveyance to a third party, as soon as he should prove up and obtain the certificate, and that he has himself paid nothing whatever, either for land office fees, or other expenses, or for the government price, as also provided in the contract, and that immediately upon receiving the certificate of final entry he conveyed the land—under said contract—all in transferee's interest.

From this decision the Nelson Lumber Company duly appealed, and before your office had passed on the case, the act of March 3, 1891 (26 Stat., 1095) was approved, and on June 16, 1891, the Boston Safe Deposit and Trust Company, of Boston, Massachusetts, applied to intervene in said case, and asked that Comisky's entry be confirmed under the provisions of section 7, of the act of March 3, 1891, *supra*.

Said company claimed that it was a *bona fide* incumbrancer for value, and as evidence thereof filed an abstract of title, properly certified, showing that on March 21, 1885, the C. N. Nelson Lumber Company executed a trust deed to secure the Boston Safe Deposit and Trust Company for a floating indebtedness amounting to \$1,200,000, embracing all lands held by the C. N. Nelson Lumber Company in St. Louis and other counties, which the said company had acquired either by entry or purchase, among which was the land in controversy, the title to which in the C. N. Nelson Lumber Company was also shown by a chain of transfers from William Comisky.

Pending the disposition of the transferee's application for re-instatement of Comisky's entry, on the appeal of the Lumber Company from the adverse action of the register and receiver, the plaintiff, Nicholas C. Drew, on August 27, 1889, was permitted to make pre-emption cash entry, No. 1064, for the land involved herein.

On October 13, 1891, your office rendered a decision holding that the cancellation of Comisky's entry was unauthorized, because he had not been given an opportunity to defend it; that Drew's entry was improperly allowed; that Comisky's entry fell within the confirmatory provisions of Section 7 of the act of March 3, 1891; and that upon your office decision becoming final, said entry would be passed to patent. Drew's entry was held for cancellation with the right of appeal, of which he availed himself, and the Department, September 28, 1892, concurred in your office decision, in so far as it held that Comisky's entry was confirmed by the act of March 3, 1891, *supra*, but the action holding Drew's entry for cancellation without notice was disapproved, and it was ordered that Drew should be allowed sixty days in which to show cause why his entry should not be canceled.

The motion of the plaintiff, Nicholas C. Drew, for review of said departmental decision, again brings the case before me.

There is only one question in the case, viz: Is the Boston Safe Deposit and Trust Company entitled to the benefits of the confirmatory provisions of section 7 of the act of 1891, (*supra*)?

Said section provides among other things that all entries made under the pre-

emption, homestead, desert land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry, and which have been sold or incumbered prior to the first day of March, 1888, and after final entry, to *bona fide* purchasers, for a valuable consideration, shall, unless upon investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

The first inquiry suggested to my mind is whether there was a valid entry of the land in controversy subsisting of record at the passage of this act. The act itself presupposes an entry existing at that date. The entry of Comisky had been canceled by your office prior to that date on the report of a special agent, without notice to the entryman. This cancellation was, in my judgment, not only unauthorized but absolutely void for want of jurisdiction. See *Castello v. Bonnie* (15 L. D., 354) and cases cited. It would follow, therefore, that the cancellation was a nullity, and that the entry remained intact, just as though the order of cancellation had not been made.

It is not denied that final proof and payment had been made and certificate issued; that there is no adverse claim originating prior to final entry; that the land had been sold prior to the first day of March, 1888, and after final entry, for a valuable consideration. It is insisted, however, that it was not sold to a *bona fide* purchaser within the meaning of the act. It does not appear, nor is it material, whether the original purchaser or incumbrancer was acting in good or bad faith. The Department has repeatedly held in construing this section, that confirmation is not defeated by want of good faith of the entryman and his immediate transferee, where subsequently, and prior to March 1, 1888, the land is sold to a *bona fide* purchaser. 13 L. D., 537, 581.

The question then is not of the good faith of the entryman, nor of the intervening transferees, but,—Is the Boston Safe Deposit and Trust Company a *bona fide* incumbrancer?

It is suggested that although the cancellation of the entry was illegal and void, the fact that an order of cancellation was of record, bound the company to take notice of the fact that an attack had been made upon the integrity of the entry, and that this was sufficient to put the said company upon inquiry, and that it was therefore not acting in good faith.

I do not agree with this view. It does not appear that the company had actual notice of the order. There can be no such thing as constructive notice of a void proceeding, for constructive notice in law, necessarily presupposes a valid act.

In the case of *Castello v. Bonnie* (on review), 20 L. D., 311, a case on all-fours with the case at bar, it was said—

It is conceded that such cancellation, without giving such notice, (that is, cancellation on report of a government agent, without giving the entryman his day in court) was improper, and to all intents and purposes so far as the transferee is concerned, it may be considered as an existing entry.

What follows would seem to be a contradiction of the language quoted and is not sound. It was further said—

But the re-instatement of the entry on the record would give the transferee only such right as he would have had in case notice had been given.

This latter holding is not only in conflict with the former, but is manifestly unsound. If the entryman had notice of the proceedings upon which his entry was canceled, then the land department had jurisdiction to make the order of cancellation, and however erroneous such cancellation may have been, on the merits of the case, the cancellation would have taken it out of the confirmatory provisions of the act of 1891, *supra*, because no entry existed at the passage of that act, and in that event the transferee could only show that the entryman had complied with the law. But inasmuch as it had already been held therein that "so far as the transferee is concerned, it may be considered as an existing entry," what follows is a *non-sequitur*.

I am of opinion that the rights of the transferees in the case at bar are fully protected under the law, and that the entry should be confirmed.

On purely technical grounds the intervening entryman, Nicholas C. Drew, is entitled to notice to show cause why his entry should not be canceled.

The motion for review is denied. The case of *Castello v. Bonnie* (*supra*) is hereby overruled, so far as it conflicts with this decision.

TOWN LOT—OCCUPANCY OF TENANT.

ALDRICH *v.* SCHLOESSER ET AL.

The occupancy of a tenant at the time of townsite entry entitles his landlord to a deed to the lot so occupied.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (J. I. H.) (C. W. P.)

The property involved is lot 3, block 75, in El Reno, Oklahoma Territory, and the case comes before the Department on the appeals of W. L. Aldrich and Rudolph Schloesser, from the decision of your office of June 27, 1895, unfavorable to their respective claims.

The decision of the townsite board awarded the lot to Schloesser; Aldrich appealed. Your office reversed the judgment of the townsite board, and held that neither party was entitled to deed.

The evidence shows that on February 19, 1892, James Thompson, whose commuted homestead entry was canceled November 26, 1892, conveyed the lot in controversy by warranty deed to Thomas T. Crittenden, who sold and conveyed the same to Rudolph Schloesser, the contestee; that in the spring of 1892, A. C. Springs, as agent for Schloesser made a verbal agreement with one Lee, by which Lee was to have

the use and possession of the lot, with the understanding that the fencing which he should place around it should revert to and become the property of Schloesser, at the expiration of the time agreed upon; that under this agreement Lee enclosed the lot with a fence and dug a well thereon; that early in December, 1892, Lee sold his improvements to W. L. Aldrich, the contestant, for \$40, stating to him at the time that he did not own or claim to own the lot.

It further appears that Aldrich, in his testimony, admitted that he knew that Lee was only a tenant of the lot, and that he was occupying it under a lease; that Aldrich, after his purchase put a tent on the lot "for sleeping purposes" . . . "for travelers," and an outhouse.

It further appears that on December 1, 1892, G. A. Aldrich, the son and agent of W. L. Aldrich, entered into an agreement in writing with Schloesser, for the use and occupancy of the lot, thereby agreeing not to give Schloesser any trouble of any kind in getting his deed to said lot from the government, in case such an emergency should arise and further agrees to give possession at any time after ten days notice, and agrees to pay fifty cents per month as lease, acknowledging at same time to be tenant of said Schloesser.

It further appears that Aldrich was in possession of the lot at the date of the townsite entry on January 30, 1893.

Schloesser's claim to the lot, under deed from Thompson, fell with the cancellation of Thompson's entry.

But it is claimed that by the improvements placed upon the lot by Lee and Aldrich, and the occupancy by Aldrich as his tenant, at the date of the townsite entry, Schloesser was in contemplation of law, the occupant of the lot and entitled to deed.

In the case of *Hussey v. Smith* (99 U. S., 20), it was held that Hussey, who was a resident of the State of Ohio, and claimed under a judicial sale of the possessory title of Smith before the lands were entered, was entitled to deed.

The court say—

The territorial law of Utah (authorized to be passed by the act of Congress before mentioned) gave to the party entitled to occupancy or possession, as well as to the occupant or occupants, the right to apply for the judgment by the probate court, upon which, when rendered, the mayor was to execute his deed. If this were not so, the right would be clearly within the equity of the act of Congress and conferred by it.

The rejection of the appellant's claim and the adjudication in favor of Smith, who had not then a shadow of right to the premises, by the probate court was, therefore, a gross error, and the supreme court of the territory repeated it by affirming the judgment.

The territorial law of Oklahoma (Sec. 6627, Stat. of Oklahoma, 1890), provides for deed

to the person, persons, associations or corporations who shall occupy or possess, or be entitled to the right of possession or occupancy thereof, according to the several rights and interests of the respective claimants in and to the same as they existed in law or equity at the time of the entry of such lands, or to the heirs or assigns of such claimants.

The evidence shows that Aldrich was an occupant of the lot at the date of the townsite entry. But it also shows that he occupied it as the tenant of Schloesser. Consequently he was not entitled to deed. But I see no reason why Schloesser can not avail himself of the possession of his tenant to acquire title to the lot. If the vendee before townsite entry of a party in possession at the time of townsite entry is entitled to deed, I can see no reason why the landlord of a tenant occupying a lot, at the time of townsite entry, is not equally entitled to deed. See *Bowie v. Graff* (21 L. D., 522).

The decision of your office is therefore reversed.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

CHARLES A. GARRISON.

The right to make a second homestead entry may be recognized where the first was canceled on account of the entryman's failure to establish residence, and such failure was due to circumstances beyond his control. •

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (J. I. H.) (W. A. E.)

Charles A. Garrison has appealed from your office decision of July 3, 1894, rejecting his application, filed April 6, 1894, to make second homestead entry to cover the NW. $\frac{1}{4}$ of Sec. 18, T. 20 N., R. 9 E., Perry, Oklahoma, land district.

Garrison's corroborated affidavit, filed in support of his application, shows that on October 16, 1891, he made homestead entry at the Oklahoma, Oklahoma, land office for the NW. $\frac{1}{4}$, Sec. 29, T. 13 N., R. 5 E.; that immediately thereafter he cleared and grubbed one acre, but that owing to the delicate health of his wife, the approaching winter, and his lack of means, he did not at once begin the erection of a house; that during the winter his wife and two children were so sick as to require his constant care and attention, and it was impossible for him to go to the land; that about April 5, 1892, his wife gave birth to a child and was attacked by puerperal fever which confined her to her bed for ten months, during which time she required constant medical attention and careful nursing; that in April, 1892, Jacob Piatt filed a contest against affiant's entry on the ground of abandonment, of which affiant was duly notified, but that owing to the sickness of his wife, and his lack of means, he was not able to appear at the trial or employ counsel to represent him, and was consequently obliged to let the case go by default; that his entry was canceled by the General Land Office on February 8, 1893; that he never, either directly or indirectly, received from Piatt or any other person any reward or remuneration for his claim to the land embraced in his former entry.

Since the decision of your office in this matter was rendered, the act of December 29, 1894 (28 Stat., 599), giving the right of second entry

in certain cases, has been passed. This act, which is in amendment of section three of the act of March 2, 1889 (25 Stat., 854), provides as follows:

That if any such settler has heretofore forfeited his or her entry for any of said reasons, such persons shall be permitted to make entry of not to exceed a quarter section on any public land subject to entry under the homestead law, and to perfect title to the same under the same conditions in every respect as if he had not made the former entry.

The "reasons" mentioned in the act of March 2, 1889, are: "total or partial destruction or failure of crops, sickness, or other unavoidable casualty."

The present case does not quite fall under the remedial provisions of the act of December 29, 1894, because the entryman here never established residence on the land and was not a "settler" in the proper meaning of that term, but it appears from his affidavit that he was prevented from establishing residence on the land by circumstances beyond his control, viz: the sickness of his wife and children.

In the case of James M. Frost *et al.*, 18 L. D., 145, Frost filed soldier's declaratory statement for a certain tract of land in the Oklahoma, Oklahoma, land district, but was prevented, "by circumstances beyond his control," from making homestead entry within six months from date of filing his soldier's declaratory statement. One Elias Berry, being informed that Frost had abandoned his soldier's declaratory statement and would not settle upon and homestead the land embraced therein, filed soldier's declaratory statement for the same tract. Both men subsequently made homestead entry for the tract: Frost, after the expiration of six months from the date of his soldier's declaratory statement and Berry within one month from the date of his soldier's declaratory statement. It appearing that both parties had acted in good faith, and they being willing to settle the matter by amicable agreement, Frost applied to enter another tract, whereupon the Department held Berry's entry intact, canceled Frost's entry, and permitted Frost to make second entry as prayed for.

Considering together the circumstances of the present case, the ruling of the Department in the case above cited, and the act of December 29, 1894, it seems clear that the spirit of the law will be followed and substantial justice done if Garrison's application is granted.

The decision of your office denying said application is accordingly reversed.

HOMESTEAD ENTRY—CONTEST—HEIR—CULTIVATION.

WARE *v.* WRIGHT.

A contest against a homestead entry on the ground that the entryman in his lifetime failed to live on, or cultivate the land, and like failure subsequently on the part of the heir, must fail, where it appears that the entryman died within six months after making entry, and that his heir, prior to the initiation of contest, maintained his right under said entry by cultivation of the land.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (C. W. P.)

On June 27, 1892, Will. T. Wright made homestead entry, No. 4754, of the NE. $\frac{1}{4}$ of section 6, T. 13 N., R. 11 W., Oklahoma land district, Oklahoma Territory. On May 9, 1893, J. G. Ware filed an affidavit of contest against said entry, charging that the entryman in his lifetime wholly failed to establish his residence on said land, or to cultivate the same, and that since his death, his father J. G. Wright, as his heir, has failed to reside on, or cultivate, or improve said tract, and has abandoned it for more than six months since the entryman's death.

A hearing was had, and upon the testimony adduced, the local officers found in favor of the defendant, and that the contest should be dismissed.

On appeal, your office affirmed the action of the local officers, and dismissed the contest. Ware appealed.

The entry was made on June 27, 1892, and the entryman died in September following, less than six months after the entry was made. It is not shown that he ever settled upon the land, but the law allowed him six months from the date of the entry in which to establish residence. The testimony fails to show that the entryman's heir at law has abandoned the land; on the contrary, it appears that in the spring of 1893, before any contest had been filed, he had thirteen furrows plowed on the claim, each half a mile long, and since the contest was initiated he has had some plowing done, and a small piece of land planted to sorghum.

The heirs are not required to reside upon the land, but only to cultivate it. I am of opinion that the facts of the case show a compliance with the requirements of the law.

The decision of your office is therefore affirmed.

TIMBER CULTURE ENTRY—APPLICATION TO ENTER—CONTESTANT.

ZACHARIAH T. BUSH.

An application to enter accompanying a timber culture contest, and pending at the repeal of the timber culture law, protects the right of the applicant until final action thereon.

The circular instructions of August 18, 1887, to the effect that applications to enter, filed with timber culture contests, shall stand rejected if not perfected within thirty days after notice of cancellation, are not applicable if the application is not returned to the local office.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 17, 1896. (W. A. E.)

In 1887, Zachariah T. Bush initiated contest against the timber culture entry of Avery B. Charpie for the SE. $\frac{1}{4}$ of Sec. 20, T. 22 S., R. 41 W., Garden City, Kansas, land district. With his contest affidavit he filed a formal application to enter said tract under the timber culture law.

On March 31, 1891, Charpie's entry was canceled by your office on said contest.

Your office, however, inadvertently failed to return to the local office Bush's timber culture application and affidavit.

October 8, 1891, Bush made timber culture entry for said tract.

By letter of October 10, 1893, your office called upon the register and receiver for report as to whether Bush had made said entry within the thirty days statutory period accorded a successful contestant.

The register and receiver, in reply, transmitted registry return receipt showing that notice of the cancellation of Charpie's entry was served upon Bush, through his duly authorized attorney, on May 1, 1891.

Your office, thereupon, by letter of October 31, 1893, held Bush's timber culture entry for cancellation on the ground that as he had failed to exercise his preference right within the statutory period, his application filed with his contest stood rejected without further action at the expiration of that period, and he thereafter had no claim that was protected from the operation of the repeal of the timber culture law on March 3, 1891.

From this decision Bush has appealed.

With his appeal he files an affidavit showing that after receiving notice of cancellation of Charpie's entry he made frequent inquiries through his attorney at the local land office in regard to his application to enter and was informed that said application had not been returned, but was still pending before the General Land Office; that said application has never been returned to the local office; that on October 8, 1891, he filed supplementary affidavit showing his qualification to enter, and was permitted to make the present entry; that since making said entry he has improved the land in good faith and now has ten acres in cultivation.

In the case of *Pfaff v. Williams*, 4 L. D., 455, it was held that a legal application to enter is, while pending, equivalent to an actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition until such time as it may be finally acted upon.

Was Bush's application to enter, filed with his contest in 1887, finally acted upon prior to October 8, 1891, the date of the present entry?

On August 18, 1887, the following circular to registers and receivers in regard to final disposition of applications to enter filed with contest was issued by the General Land Office:

In view of the decision of the Hon. Secretary of the Interior, in the case of *Pfaff v. Williams*, 4 L. D., 455, wherein it is held, etc., I have to direct, in all cases where applications to enter (filed by contestants upon initiation of contest) are returned, upon the cancellation of the entry contested, that the contestant be notified of the cancellation of the entry, and advised that he will be allowed thirty days within which to enter the tract upon the application filed, upon his showing his present qualifications, and in the event of his failure so to do, his application will stand rejected without further action upon your part, and the tract held subject to entry by the first legal applicant.

This circular provides for the rejection, without formal action, of those applications to enter, filed with contest, *which are returned* to the local office and are not perfected into entries within thirty days from notice. It does not cover or affect those applications which, for any reason, are not returned.

Bush's right to make timber culture entry after the repeal of the timber culture law was based upon his application to enter, filed prior to the repeal of that law. Under the ruling in the *Pfaff v. Williams* case, said application was, while pending, equivalent to actual entry, so far as the applicant's rights were concerned, and its effect was to withdraw the land embraced therein from any other disposition until such time as it was finally acted upon. It could not, of course, be acted upon until after final disposition of the contest with which it was filed, but immediately upon the cancellation of Charpie's entry steps should have been taken looking towards its final disposition.

The first step should have been its return to the local office, in order that Bush might have an opportunity of completing it by filing supplementary affidavit showing present qualifications and paying the requisite fees. (*Ellis v. Abbe*, 16 L. D., 436.)

Had he then failed to make entry within thirty days from notice, his application would (under circular above quoted) have stood rejected without further action.

The failure of your office to return it or take any other action looking towards its final disposition, left it pending, and it was still pending on October 8, 1891, when Bush, who, as shown by his repeated inquiries at the local office, had been expecting its return, determined to wait no longer, and accordingly made the present entry.

As he was never afforded an opportunity of completing the applica-

tion upon which his right to make timber culture entry was based, his delay in making entry can not be attributed to negligence on his part.

Your office decision is accordingly reversed and Bush's entry of October 8, 1891, will be considered as a furtherance and completion of his original application and will be allowed to stand.

PRACTICE—NOTICE OF APPEAL—SERVICE.

BOYLE *v.* NORTHERN PACIFIC R. R. CO.

Notice of an appeal duly served on a general land agent of a railroad company is sufficient service on said company.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 17, 1896. (F. W. C.)

With your office letter of November 29, 1895, was forwarded the record in the case of John L. Boyle *v.* Northern Pacific R. R. Co., involving lot 3, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 35, T. 28 N., R. 8 E., Seattle land district, Washington, on appeal by Boyle from your office decision of June 12, 1895, holding for cancellation his commuted homestead entry, covering the tract before described, for conflict with the grant for said company.

A motion has been filed on behalf of the company to dismiss the appeal filed by Boyle for the reason that the same was not served upon F. M. Dudley, of St. Paul, Minnesota, the person named in the notices posted in the several land offices in Washington, as the proper agent of the company upon whom all notices should be served.

Attached to the appeal is the following affidavit of service:

Jos. W. Grégory, being sworn on his oath says I am the attorney of record for John L. Boyle, in the matter of his cash entry No. 15115, for the lot 3, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 35, Tp. 28 N., R. 8 E., now pending before the Department of the Interior, and I have this day made service of notice of appeal and specification of error in said matter upon Thomas Cooper, General Land Agent of the Northern Pacific R. R. Company, by sending, by registered mail, postage prepaid, a true copy of said notice of appeal and specification of error, to said Cooper, at his office at Tacoma, Washington, proof of which mailing is hereto attached and made a part hereof.

In support of the company's motion the decision of this Department in the case of O'Connor *et al. v.* Northern Pacific R. R. Co. (15 L. D., 247) is referred to.

That case arose upon a mineral application which conflicted with a list filed by the company on account of its grant, and hearing was ordered by the local officers to determine the character of the lands.

Notice of this hearing was served upon a local firm of attorneys who had represented the company in several other cases but had never filed a general appearance for the company.

At the hearing the company was not represented, the testimony taken being *ex parte*.

It is true that in the O'Connor case it was held:

In the absence of a designation of a particular person, notice might be held to be sufficient, if given to any agent of the company resident in the State, but notice had been given of the designation of F. M. Dudley as attorney, to whom the local officers gave notice of their decision, and, in the absence of notice to him, unless waived by the company, I am of the opinion that no jurisdiction was acquired over it, and it can not be held to be bound by the testimony taken.

In that case notice had been served upon a firm not authorized to accept notice for the company, and it could not therefore be held to be bound by the service; in other words, no service had been made. While it might be inferred from the language used that jurisdiction could not be acquired except by service upon the designated attorney, yet it was not the intention to so hold, but rather to show that in that case no service had been made to bind the company.

The company having designated a person to accept service for it, it would seem to be proper to serve all notices upon that person, but it can not be held that service upon any other proper person will not bind the company.

The decision in the O'Connor case can not be enlarged upon and can not be held to be authority for dismissing the appeal now under consideration.

Under the Session laws of 1893, of the State of Washington, chapter 127, providing for the commencement of civil actions in Superior Courts, it is provided, Sec. 7:

The summons shall be served by delivering a copy thereof. . . . (4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this State.

I can see no good reason why an appeal in the matter of a contest against the company, pending before the land department, might not be served upon any person authorized under the State law to accept service for the company in a civil action.

This appeal was duly served upon the general land agent of the company at Tacoma, Washington, and the service is to my mind sufficient, and the motion to dismiss is accordingly denied.

RAILROAD GRANT-INDEMNITY SELECTIONS—ACT OF JUNE 22, 1874.

SOUTHERN-PACIFIC R. R. Co.

By the joint resolution of June 28, 1870, authorizing the Southern Pacific R. R. Co. to construct its road upon the line designated by its map of January 3, 1867, the rights of all persons who were actually settlers at the date of said joint resolution were protected; and it accordingly follows that lands occupying such status do not afford a basis for indemnity selections under the act of June 22, 1874, as the company had no title thereto.

A decision of the General Land Office that on relinquishment a railroad company will be entitled to select indemnity under the act of June 22, 1874, does not preclude departmental consideration as to the right of the company to thus relinquish, when the selections come before the Department for approval, and if it is then found that the company had no title to the land relinquished the selections must be rejected.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 17, 1896. (F. W. C.)

I am in receipt of your office letter of October 18, 1895, resubmitting for the consideration and approval of this Department, list No. 3, embracing 237.40 acres, selected by the Southern Pacific R. R. Co. under the provisions of the act of June 22, 1874 (18 Stat., 194).

This list has before been the subject of decision by this Department, being considered in departmental decision of April 30, 1892 (15 L. D., 460), in which its approval was refused upon the ground that under the decision of the supreme court in the case of the United States v. Missouri, Kansas and Texas Ry. Co. (141 U. S., 358), the alternate reserved sections within the primary limits of a railroad grant could not be selected in lieu of lands relinquished by the company, under the act of June 22, 1874, *supra*.

Upon review said decision was reversed March 26, 1894, (18 L. D., 275) and you were directed to resubmit the list for re-examination. It is in accordance with directions here given that the list is again submitted by your office letter of October 18, 1895, and in said letter a history is given of each of the tracts made the basis for the selection in question, the same being gathered from the records of your office from which it appears that the lands comprising the bases for the selections in question were all settled upon and settled prior to the passage of the joint resolution of June 28, 1870 (16 Stat., 386), authorizing this company to construct its road upon the line designated by the map filed in this Department January 3, 1867. By said resolution it is provided as follows:

That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved by July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

In departmental decision of April 23, 1875, in the case of *Queen v. Southern Pacific Railroad company*, it was held that the company's right under this grant, made by the act of July 27, 1866 (14 Stat., 292), took effect upon the filing of the map of designated route January 3, 1867.

Acting upon the holding made in said case, the company was requested to relinquish, under the provisions of the act of June 22, 1874, in favor of Queen and several others, whose lands are made the bases for the selections now under consideration. The company duly relinquished as requested; said relinquishments being accepted by your office, and the entries of the parties have since been passed to patent.

In departmental decision of August 2, 1878, in the case of *Tome et al. v. Southern Pacific R. R. Co.* (5 C. L. O., 85), it was held, quoting from the opinion of the Attorney General (16 Opinions, 80), that—

Although a grant of lands was made to the company by the act of July 27, 1866, the lands upon which it would operate were not identified until the date of the passage of the joint resolution of June 28, 1870, authorizing the company to construct its road upon the line designated upon the map filed in the Interior Department January 3, 1867, and that the rights of all parties who were actual settlers June 28, 1870, were saved. Qualified settlers prior to June 28, 1870, may be allowed under the homestead law. See *Southern Pacific R. R. Co. v. Rahall*, 3 L. D., 321; *Southern Pacific R. R. Co. v. Dooley*, 5 L. D., 380.

Under this decision the claimants in whose favor the company relinquished, and whose claims were made the bases for the selections under consideration, were duly protected by the joint resolution of June 28, 1870, and the company's relinquishment under the act of 1874, must therefore be held to have been unnecessary.

It is urged, however, by the company, that as the act of June 22, 1874, provides:

If any other lands granted be found in the possession of an actual settler, whose entry or filing has been allowed under the pre-emption or homestead laws of the United States, subsequently to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantee, upon a proper relinquishment of the land so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof, etc.,

that by its relinquishment upon the request of your office, its right to make a lieu selection under the act of 1874 attached, and no change of rule affecting the question as to the company's right to the lands relinquished, could affect its right to make such lieu selection.

It has repeatedly been held by this Department, that the right of the company to select indemnity under the act of June 22, 1874, will not be considered in the absence of an application to select a specific tract in lieu of that relinquished. *Central Pacific R. R. Co.* (6 L. D., 815); *Halgrin Tostenson* (6 L. D., 820).

In the case of *Winona, St. Peter v. Warner* (6 L. D., 611), it was held that a decision of the land office that on relinquishment the railroad company would be entitled to select indemnity under the act of June

22, 1874, will not preclude departmental consideration as to the right of the company to thus relinquish, when the selection comes before the Department for approval, and that selection under said act must be rejected if it appear that the company had no title or right in the tract relinquished.

In the case of *Harris v. Northern Pacific R. R. Co.* (10 L. D., 264), it was held that a relinquishment under the act of June 22, 1874, confers no right upon the company if the land relinquished was in fact excepted from the grant.

Although the relinquishments covering the lands made the bases for the selections now under consideration were executed and filed in 1876, the selections now under consideration were not made until during the years 1889 and 1890.

It is unnecessary therefore to determine what would have been the effect had the company, after relinquishing as requested by your office, and before the change of ruling in the matter of the company's rights under its grant, made selection under the act of June 22, 1874, as no such question is presented by the record now before me, the selections in question having been made, as before stated, after the change of ruling under which these people were fully protected in their rights without the company's relinquishment.

Under departmental decision of August 2, 1878, before referred to, with which I concur, it must be held that the company's relinquishment was unnecessary for the protection of the claims embracing the tracts made the bases for the selection now under consideration, and under the previous decisions of the Department, before referred to, I must hold said relinquishments confers no right upon the company, and I must therefore again return said list to your office without my approval.

PROTESTANT—PRE-EMPTION FINAL PROOF—PREFERENCE RIGHT.

DAVIES *v.* CATHCART.

A protest against the allowance of pre-emption final proof secures to the protestant no preference right of entry, in the event that such proceedings result in cancellation of the pre-emption declaratory statement.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 17, 1896. (C. W. P.)

I have considered the case of John Davies against Robert Cathcart, involving the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31, T. 5 N., R. 28 W., S. B. M., Los Angeles land district, California, on appeal by Davies from the decision of your office of April 20, 1894.

It appears by the record that said Cathcart made homestead entry, No. 4402, on June 27, 1888, and said Davies filed declaratory statement, No. 5748, on September 10, 1888, for the above-described tracts; that

on June 5, 1889, Davies made final proof, against the acceptance of which Cathcart filed protest, alleging failure of Davies to comply with the pre-emption law; that on a hearing had before the local officers, they recommended the rejection of Davies' final proof and the cancellation of his declaratory statement. Davies appealed.

It further appears that on December 22, 1890, Davies filed affidavit of contest against Cathcart's entry, alleging failure to comply with the homestead laws; that a hearing was thereon had, and that the local officers recommended the cancellation of the entry. Cathcart appealed.

Your office considered both appeals in the same decision, affirming the action of the local officers in the case of Cathcart *v.* Davies, and reversing it in the case of Davies *v.* Cathcart. Davies appealed to the Department, and the decision of your office in the case of Cathcart *v.* Davies was affirmed, and in the case of Davies *v.* Cathcart reversed. Davies' declaratory statement and Cathcart's homestead entry were ordered to be canceled. A motion for review of this decision was denied June 2, 1893.

On December 9, 1892, Davies made application at the local office to enter said tracts as a homestead. His application was held suspended pending the determination of said motion for review. On July 3, 1893, Davies again tendered his application, which was further suspended owing to a vacancy in the office of receiver. On August 9, 1893, Davies again tendered his homestead application.

On July 6, 1893, Cathcart filed homestead application for said tracts, which was held suspended for the same reason that Davies' application of July 3, 1893, had been suspended.

On August 17, 1893, the local officers rejected Cathcart's application, and on August 18, 1893, allowed Davies to make entry of said land.

Cathcart appealed. Your office reversed the judgment of the local officers, and held that the applications of Cathcart and Davies should be treated as simultaneous, as each had a preference right of entry.

Davies appeals to the Department.

In my judgment the decision of your office is erroneous. The record shows that Cathcart occupied the status of a protestant, and not of a contestant; consequently he acquired no preference right of entry by procuring the cancellation of Davies' declaratory statement.

The Rules of Practice (1, 2, 3 and 54), direct the manner in which a contest may be initiated and conducted. A compliance with these rules fixes the status of a person contesting an entry and claiming a preference right under the act of May 14, 1880. The record fails to show a compliance with these rules, and Cathcart acquired no preference right to the land. Davies' entry will remain intact. Your office decision is reversed, accordingly.

TOWNSITE ENTRY IN OKLAHOMA—PARK RESERVATION.

CITY OF GUTHRIE *v.* NICHOLS ET AL.

The reservation of land for park purposes is made obligatory upon townsite trustees by section 22, act of May 2, 1890, and the occupancy of land by townsite settlers prior to the passage of said act, confers no rights upon said occupants as against the reservation thereof under a survey and entry made after the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (E. E. W.)

STATEMENT.—On the 10th of November, 1892, the trustees of the town of Guthrie, Oklahoma, entered, as the townsite of West Guthrie, all of the W. $\frac{1}{2}$ Sec. 8, T. 16 N., R. 2 W., except a tract containing 17.9 acres, known as Noble Park, which was particularly described by metes and bounds, and expressly excepted and reserved as a public park. This reservation was also expressly excepted from the patent, which was issued on the 16th of February, 1893.

In December, 1892, George Nichols, and some twenty or thirty other persons, applied for deeds to separate portions of the said reservation, describing their respective tracts by metes and bounds, and alleging improvement and occupancy. The trustees held that as the land was not embraced in their entry, they were without jurisdiction to consider these applications, and no action was ever taken on them. But on the 8th of June, 1894, the trustees applied to enter the land as a townsite, for the benefit of the occupants thereof; and on the 15th of August, 1894, the city of Guthrie applied, through its legally constituted authorities, to enter it as a park reserve. The register and receiver forwarded both of these applications to the Commissioner of the General Land Office, and asked for instructions. On the 11th of January, 1895, the Commissioner of the General Land Office ignored the application of the trustees, and instructed the register and receiver to accept the application of the city of Guthrie, which they did, and the entry was made by the city on the 18th of the same month. On the 28th of March, 1895, the said applicants for deeds, George Nichols and others, filed a protest against the entry, and asked that the trustees be required to make deed to them. On the 13th of April, 1895, the Commissioner of the General Land Office overruled this protest and petition, and the applicants appealed to the Department.

In the city of Guthrie's application to enter it is shown that the city of Guthrie is a duly organized municipal corporation; that the said Noble Park contains more than ten and less than twenty acres; that it is situated within the limits of the said city of Guthrie, and that the same was surveyed, platted, and expressly selected and reserved as and for a public park when that part of the city known as West Guthrie, in which the said park is situated, was entered.

In their decision refusing to take jurisdiction the trustees say that it was impossible to lay off a park, as required in section 22 of the act of Congress of May 2, 1890, without disturbing some occupants; that they endeavored to disturb as few as possible; that the ground actually selected had fewer people on it than any other portion of the tract; and that they made the first survey of the land.

OPINION.—The setting apart of one or more reservations containing in the aggregate not less than ten nor more than twenty acres was a statutory requirement with which the trustees were compelled to comply. It is provided in Sec. 22 of the act of Congress of May 2, 1890, 26 Stat., 81, that—

hereafter all surveys for townsites in said Territory shall contain reservations for parks (of substantially the same area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres; and patents for such reservations, to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities.

And it was said in the decision of the Department in the case of McGrath, et al., 20 L. D., 542, that—

The trustees of a townsite are not authorized to make deed to a lot until the tract has been surveyed and platted into lots and blocks, streets and alleys. Rev. Stat., 438; 26 Stat., 109. By this proceeding the streets and alleys are dedicated to public use, and the trustees have no authority to execute a deed to any portion of either a street or an alley. To make such survey and plat and dedication of streets and alleys is not only the right of the body of the occupants of the site moving together, but it is a requirement of the law which they must comply with before they may enjoy its benefits, and no individual occupant can acquire any right to his particular claim prior to such survey and dedication as against this right and requirement of all the occupants as a community. The reason for such surveying and platting, and dedication of streets and alleys, is too obvious to require explanation. Without such care and contribution there could be neither order, system, convenience, nor beauty.

The same must be said of parks. The applicants contend in their protest that they established occupancy prior to the passage of the said act of Congress of May 2, 1890, and had thereby acquired vested rights in their respective lots of which the law could not deprive them. But this contention is not well taken. The survey and entry of the townsite were not made until after the passage of the act. The survey and entry could then only be made under its provisions, and by their prior occupancy the applicants had acquired no rights as against its requirement that not less than ten nor more than twenty acres should be reserved for a park.

The decision of the Commissioner of the General Land Office is affirmed.

CANCELED ENTRY—REINSTATEMENT—ADVERSE RIGHT.

PEHLING *v.* BRUER.

A claimant under a canceled entry is not entitled to reinstatement after the lapse of years and in the presence of an intervening adverse right, where his entry is canceled on account of supposed conflict with a prior claim, and he thereafter fails to appeal from a denial of his application to contest the validity of said claim.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 18, T. 110 N., R. 29 W., Marshall land district, Minnesota, and is before the Department upon motion for re-review of the decision of the Department of July 18, 1895, adhering to the decision of April 18, 1895.

The record shows that Bruer made soldiers' additional homestead entry for this land on January 12, 1874, and that on November 24, 1876, the land was claimed by the State of Minnesota as swamp land under the act of March 12, 1860.

March 13, 1878, this entry was held for cancellation for conflict with the swamp land selection.

From that decision the defendant took no appeal.

Subsequently, on October 22, 1892, your office canceled the selections of the State.

January 12, 1893, Henry Pehling made homestead entry for the tract. Subsequent to the allowance of this entry, the cancellation of Bruer's entry made in 1878, was rescinded and Pehling was called upon to show cause why his entry should not be canceled for conflict with that of Bruer.

Pehling, in his answer to such notice to show cause, set out that he had made his entry in good faith without knowledge that Bruer had any legal rights or equities to the tract, or that he laid any claim thereto; that since the year 1874 he had known the defendant Bruer and that during that time he, the defendant, had never occupied or improved the same; that he had made inquiry as to the status of the tract and had been informed by the local officers that it had previously been selected by the State of Minnesota as swamp land but the selection had been canceled in 1892; that the land was government land, and that, relying upon this, he had made the entry aforesaid.

In your office decision, rendered on August 12, 1893, the entry of Pehling was canceled in favor of Bruer, and upon appeal, the decision of this Department of April 18, 1895 (20 L. D., 363), reversed the action of your office and held that Bruer, having failed to appeal from the decision of your office in 1878 canceling his entry, could not then be heard to assert any title or interest in and to the land.

On July 18, 1895, the case being then before the Department upon motion for review (21 L. D., 65) and it being urged that Bruer had no notice of the decision of your office of 1878 canceling his homestead

entry, it was said that that question was improperly raised in the motion for review and should have been presented when the case was before the Department upon appeal.

In the motion for re-review the defendant excepted to this holding and urged that no notice having been given to Bruer of the decision of that date, and Bruer having made an affidavit on January 11, 1879, in the local office, in which he denied the reception of notice, that such decision was without force or effect, as determining his rights, and that it can not be expected of him to appeal when he had no knowledge of any adverse action.

The affidavit is as follows:

STATE OF MINNESOTA,

County of Brown, U. S. Land Office, New Ulm, Minnesota, ss:

Henry B. Bruer being first duly sworn upon his said oath, deposes and says that he is the identical Henry B. Bruer who on the 12th day of January A. D. 1874, has made application for entry under the homestead laws of the United States approved May 20, 1862, and March 21, 1864, entitled "An Act to secure homesteads to actual settlers on the public domain," upon the north half of the southwest quarter of section No. 18, in township No. 110, of range 29, containing 80 acres, at the U. S. Land office at New Ulm, Minn., and received certificate for fees from the receiver for the payment of fees for said application marked final receiver certificate No. 2222, application No. 7972.

That ever since said application he has been in possession of said tract of land and made considerable improvements thereon.

That never until this day, this deponent has any intimation that his said entry was suspended on account of said tract being swamp land reverting to the State of Minnesota; that he desired to contest said claim and wishes to be permitted to offer proof as to the character of said lands.

HENRY B. BRUER.

Subscribed and sworn to before me this 11th day of January A. D. 1879.

C. C. GOODNOW, *Rec.*

It will be noted that this affidavit denies reception of notice of the decision of 1878, and asks that opportunity be given him to contest the claim of the State as to the character of the land.

Assuming, for the sake of argument, that the contention is right that no legal notice was given to Bruer of the decision of 1878 canceling his entry, and that in the absence of such notice the decision was without force and effect, as determining his rights to the land in controversy, it can, nevertheless be said that if action were taken upon his application to contest the claim of the State, and it were rejected, and from such rejection no appeal was filed by him, his rights would, by such failure to appeal, cease and determine.

In reply to a communication addressed to your office on January 8, 1895, as to what action, if any, was taken upon the application of Bruer to contest the selection of the State, your office forwarded a copy of the annotations appearing upon the records of contests in the swamp land division, chronologically set out as follows:

To R. & R. Mar. 13, 78, held for cancellation, to notify parties in interest, and allow sixty days for appeal.

July 11, 78, R. & R. report due notice given, the time allowed for appeal expired, and no appeal filed.

To R. & R. July 30, 78, final cancellation ordered, and homestead papers returned to div. C. N. 95781, Feby. 8, 79, R. & R. transmit affidavit & application of Bruer to submit evidence as to character of land.

To R. & R., April 17, 1879, application refused.

Swamp claim rejected Oct. 22, 1892, "K."

Prior to this time a letter having been addressed to the local office for evidence of service of notice of the decision of April 17, 1879, the local officers replied that the decision on file in the office was endorsed as follows: "April 17, 1879. Henry Bruener. Baasen notified April 22. 60 days." No denial was made by Bruer of the reception of notice of the rejection of his application to contest. The law presumes that everything that should be done was done, and in the absence of a denial by Bruer, it will be assumed that the notification given of the rejection of his application to contest the claim of the State was a proper one. It is found that from the date of the rejection of his application to contest—which was subsequent to his knowledge that action had been taken upon his entry—up to the year 1892, he has done nothing before the land office, or here, in assertion of any rights to the land. Can it be said that after a laches extending over a period of fourteen years, he can present such a case now as would entitle it to favorable reception? I do not think so. Whatever rights he may have possessed, he has lost. At the time the entry of Pehling was allowed, the land was unappropriated public domain as far as the tract-books of the land office or your office show, and the defendant having acquiesced for so long a period in the adverse action of your office, will not be now heard to assert any rights in the premises.

The motion is denied.

HOMESTEAD ENTRY—COMMUTATION—PERIOD OF RESIDENCE.

GARDNER ET AL. v. WELSTEAD ET AL.

The requirement of fourteen months' residence after entry, as a pre-requisite to the commutation of a homestead entry made after the amendment of section 2301, R. S., must be observed even though settlement was made prior to the amendatory act; and an entry so made, and commuted, without such compliance with law, can not be equitably confirmed for the benefit of transferees, where the commutation was made before the expiration of fourteen months from date of settlement.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (P. J. C.)

It appears by the record before me that George W. Welstead presented his application to make homestead entry, alleging settlement December 20, 1890, for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, T. 36 N., R. 9 E., Wausau, Wisconsin, land district, January 17, 1891. This application was not allowed until June 11, 1891. No reason is given for its being withheld. He commuted the same to cash entry August 18, 1891.

By his final proof it is shown that he commenced building December 20, 1890, and established residence January 10, 1891.

On June 9, 1893, P. Gardner *et al.* filed affidavits alleging that the entryman did not comply with the law as to residence and improvements, and that at the time of the entry they and others were occupying said land as a townsite. On these affidavits, together with the report of a special agent, your office, by letter of July 26, 1893, ordered a hearing, which was accordingly had, when G. S. Coon intervened, showing purchase of the land from The Rhinelander Lumber and Shingle Company, which had purchased it from the entryman. The local officers decided against the contestants, holding that they had no adverse interest in the land, and recommended that the proof be allowed to stand. The contestants appealed, and your office, by letter of March 17, 1894, affirmed the finding of the local office, as against the contestants, but decided that the final proof had been prematurely made, in that the claimant had not resided upon the land fourteen months from date of entry, as required by section 6 of the act of March 3, 1891 (26 Stat., 1095), and gave him reasonable time in which to make supplemental proof showing compliance with the requirement, and upon his failure to do so, held his entry for cancellation. Both parties have appealed.

From an examination of the testimony I am satisfied that your office has fairly and sufficiently stated the facts, and I see no reason for disturbing the judgment.

It is contended that inasmuch as Welstead settled on the land December 20, 1890, his rights should relate back to that date, and he should be permitted to make commutation proof under the law as it stood at the date of his settlement. This question was considered at length in the case of Matthew Benson (18 L. D., 437). The facts in the case at bar are very like those stated in that case. An examination of the records in your office shows that one August L. Lehman made homestead entry of the tract involved in this controversy, together with other land, on December 20, 1890, and the same was on relinquishment canceled May 29, 1891. It is clear, therefore, so far as disclosed by the record, that Welstead's right did not attach prior to May 29, 1891. In the Benson case it was decided (*syllabus*):

A homestead entry made since the amendment of section 2301 R. S., can not be commuted without fourteen months residence and cultivation from date of entry, even though settlement was made prior to the passage of the amendatory act.

This case is distinguished from those of Herbert H. Augusta (21 L. D., 200), and Francis A. Lockwood (*Id.*, 491), and Charles E. Tompkins *et al.* (*Id.*, 203), in that in those cases fourteen months actual residence, though part of the time was before entry, was held a substantial compliance with the law, and where the land had been transferred to a *bona fide* transferee, the entry might be referred to the board of equitable adjudication.

In the case at bar it will be observed that Welstead claims settlement from December 20, 1890, and final proof was submitted August 18, 1891, which was about eight months after settlement.

Your office judgment is therefore affirmed.

RESERVATION—EXECUTIVE ORDER—CONSTITUTIONAL QUESTIONS.

WILLIAM A. BARNES.

A reservation of lands declared by executive proclamation, subject to Congressional action and subsequently ratified by Congress, is operative from the date of the proclamation.

Executive orders promulgated by the President, and acts of Congress, are presumably constitutional, and will be so regarded by the Department until declared unconstitutional by a court of competent jurisdiction.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (C. J. W.)

On March 13, 1894, William A. Barnes made application at the land office at Perry, Oklahoma, to enter, under section 2289, U. S. Revised Statutes, the NE. $\frac{1}{4}$, Sec. 13, T. 22 N., R. 6 E., which application was rejected, because included in lands reserved from entry. Barnes appealed from the action of the local officers, and on July 30, 1894, your office affirmed said decision.

Barnes has appealed from your office decision, and the only question presented by the appeal involves the constitutionality of the acts of Congress of March 3, 1893 (27 Stat., 640), and of May 4, 1894 (28 Stat., 71) and of the executive order based on the first named act.

The President in his proclamation of August 19, 1893, reserved sections 13 and 33, not otherwise reserved or disposed of, in the former Cherokee Outlet, for the purposes therein mentioned, subject to the action of Congress. The reservation of said sections was made pursuant to Sec. 10 of the act of Congress of March 3, 1893, aforesaid. Congress by act of May 4, 1894, ratified the reservation of these sections. The land applied for is included in said reservation and for that reason held not to be subject to entry.

It is insisted that the order of reservation could in no event take effect before the date of the ratifying act; but I do not think the position well taken. Construing the two acts of Congress together, the one authorizing the reservation to be made, and the other ratifying it after it was made, results in the reservation becoming effective from the date of the proclamation of the President in which said reservation was made. Executive orders promulgated by the President, and acts of Congress, are presumably constitutional, and will be so regarded by this Department, until declared unconstitutional by a court of competent jurisdiction. *Wenzel v. St. Paul M. & M. R. R. Co.* (1 L. D., 335); *Heirs of John E. Bouligny* (6 L. D., 13).

Your office decision is approved.

PRACTICE—MOTION TO DISMISS CONTEST—REHEARING.

HAYES *v.* RICHARD.

Where the local office sustains a motion to dismiss a contest, filed by a defendant who submits no testimony, and such action is reversed on appeal, the case should be remanded for a further hearing before the local office.

Secretary Smith to the Commissioner of the General Land Office, February (J. I. H.) 17, 1896. (I. D.)

The defendant in the case of Hayes *v.* Richard has filed his motion for a reconsideration of departmental decision of January 19, 1895, involving the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1, 2 and 3, Sec. 24, T. 8 S., R. 1 E., New Orleans land district, Louisiana.

The defendant, Richard, made timber culture entry for the land July 11, 1883, and on August 10, 1891, after due publication, he made final proof before the clerk of the district court of the parish of Acadia.

Hayes appeared at the taking of such final proof and filed a protest against its acceptance, cross-examined Richard and his witnesses, and offered witnesses against Richard's claim.

August 11, 1891, Hayes filed his affidavit of contest against Richard's timber culture entry, but in such general terms that it would hardly warrant a hearing, but on August 22, 1891, he filed an amended affidavit charging specifically that Richard had failed to comply with the timber culture law during the fourth year. Notice on this affidavit was not issued until October 17, 1891, fixing November 27, 1891 for hearing.

August 27, 1891, Richard filed a relinquishment of his timber culture entry and applied to make homestead entry of the land. It appears that he did this because of the advice of the register who says he informed him that his final proof would be rejected for reasons the register then gave to Richard.

November 28, 1891, your office directed that Richard's homestead entry be allowed but that order was made without knowledge of the contest, indeed, the papers relating to the homestead entry were filed in the General Land Office sometime before the notice was issued on the affidavit. After the evidence at the hearing (Richard being present but offering no evidence on behalf of his timber culture entry), Richard moved to dismiss the contest, which the local officers did upon two grounds stated by them.

Since then, appeals, motions for review and rehearings have been made, and decisions made thereon, but it is not necessary to recapitulate them in the view taken of the case.

Richard had resided, with his family, on the land for eight years at the time he relinquished and applied for homestead entry and had put all his labor during that time upon it, making valuable improvements thereon, and treated it as his home. When he filed his relinquishment

he acted under the advice of the government land officers and swears that he had no knowledge of the affidavit of contest, and the register says that Richard had no means of knowledge.

It appears clearly that Richard's relinquishment not only was not because of Hayes' contest and before service of notice of any contest, but was in utter ignorance of its existence. The relinquishment, then, was made in good faith and his years of residence and cultivation of the land as an actual settler thereon, seems in equal good faith.

Upon the hearing the local officers dismissed Hayes' contest and Hayes appealed, and on December 23, 1892, said appeal was sustained; the dismissal was reversed and said homestead entry held for cancellation. Richard then moved for a review of this decision, which was refused June 1, 1893, and June 13, 1893, he filed a petition for a reconsideration of said decisions of December 23, 1892, and June 1, 1893, asking for a rehearing on the grounds that he had been misled by the advice of the register and by the cancellation of said timber culture entry, and the allowance of his homestead entry, and alleges that he can prove his compliance with the timber culture law if allowed.

Your office decision of July 29, 1893, says:

In the light of the circumstances reported by your office, and of the facts disclosed by the said final proof, I think that justice demands that Richard should be afforded an opportunity to show that he had complied with the requirements of the timber culture law, if it be a fact that he did make such compliance.

I, therefore, revoke, set aside and vacate both the decision of this office, of December 23, 1892, holding said homestead entry for cancellation, and my action of June 1, 1893, denying a motion for a review of that decision, and direct that you fix a day for a hearing, duly notify the parties thereof, and serve upon each of them a copy of this decision.

At said hearing you will proceed as in ordinary hearings in contest cases, and take such testimony as shall be submitted relative:

First.—To the alleged failure of Richard to comply with the requirements of the timber culture laws during the fourth year after his entry, and

Second.—Relative to the question as to whether the relinquishment of said timber culture entry was the result of Hayes' contest, or was the voluntary act of Richard, made without a knowledge of the pending contest.

You will, after the taking of the testimony, proceed under the rules of practice to render your decision thereon, notify the parties of such decision and in due time transmit the record to this office as in other cases.

August 1, 1893, Hayes appealed from said decision ordering a rehearing, stating seven grounds of error but they are all embraced in two general propositions: First, that the Commissioner abused his discretion in revoking his former decisions and ordering a rehearing; and second, because the testimony shows an utter failure on the part of Richard to comply with the timber culture law.

On January 19, 1895, this Department sustained Hayes' appeal and reversed your office decision of July 29, 1893, ordering a new hearing.

May 6, 1895, Richard filed his motion for review of the decision of January 19, 1895, stating several grounds of error only part of which need be considered.

It is urged on behalf of Hayes and against a rehearing, that Richard had his day in court and risked his case on the evidence offered by Hayes and the motion to dismiss the contest for reasons stated in said motion.

A careful review of the record and the facts in this case shows that Richard is an ignorant man and acted under the advice of a government officer in relinquishing his timber culture entry; that he had lived on the land for eight years continuously, at his home, and put all his labor on improving it; that the final proof, and the evidence taken at the hearing together, leave the case in a state of honest doubt without considering the report of the special agent which appears among the papers; that although present at the hearing in person and by attorney, he still acted on the belief that the register's advice was sound and that after relinquishing his timber culture entry on the record, his homestead entry would be good and would save the land.

Your said office decision of July 29, 1893, says:

In view of the peculiar circumstances surrounding this case, and especially of the facts set forth in your said report of June 23d, I do not think that this office was in possession of sufficient evidence at the date of its said decisions of December 23, 1892, and June 1st, 1893, to justify the actions then taken,

and ordered a rehearing as hereinbefore stated.

Without passing upon the sufficiency of the evidence on the charge against the timber culture entry, it at least presents such a case as comes within rule of practice 72, and it cannot be held that any abuse of discretion was committed in the office decision of July 29, 1893. At the hearing, while Richard did not offer testimony, he moved to dismiss the contest after the evidence of contestant had been heard. That motion being sustained, he was not called upon to offer proof to sustain the timber culture entry.

Where the local office sustains a motion to dismiss, filed by a defendant who submits no testimony, and such action of the local office is reversed on appeal, the case should be remanded for the further action of said office. *Bradford v. Aleshire* (18 L. D., 78).

Departmental decision of January 19, 1895, is vacated and set aside and your office decision of July 29, 1893, is approved. The case will be remanded for a rehearing as therein stated.

PRIVATE CLAIM—SCRIP—ACT OF JUNE 22, 1860.

MANUEL GARCIA.

A private land claim having been confirmed in its entirety by judicial proceedings under the act of June 22, 1860, and the acts amendatory thereof, and a decree entered that the claimant should have patent for a specified number of acres, found by the court to have been unsold by the government, and scrip for the remainder, and it appearing that a part of the lands so confirmed in place had in fact been disposed of by the government prior to said decree, additional scrip may issue to cover said deficit, in accordance with the intent of section 6, of said act, and the manifest purpose of the court.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 17, 1896. (G. C. R.)

Your office letter ("G") of December 18, 1895, refers to the Spanish grant to Manuel Garcia, made September 1, 1806, by the Spanish intendant Morales; also to the judgment of the United States district court of Louisiana, rendered May 15, 1874, wherein the petition of the heirs of Manuel Garcia, praying for the confirmation of said grant, was allowed, and the grant confirmed.

The suit appears to have been instituted on the 28th day of August, 1872, under the act of June 22, 1860 (12 Stat., 85), extended by the acts of March 2, 1867 (14 Stat., 544), and June 10, 1872 (17 Stat., 378), said heirs claiming confirmation of their title to certain tracts of land embracing 15,000 arpents.

It appeared at the trial that all the land embraced in the grant to Manuel Garcia had been disposed of by the United States, with the exception of 621.53 acres; and the court decreed that patents for that residue "must be issued to the plaintiffs under the 11th section of the act of 1860," and for the remainder of the grant (12,128.47 acres)

certificates of location must be issued to the claimants under the sixth section of said act, for every legal requisite of title having been established by said claimants, their right to the land granted to their ancestors must be acknowledged and the title confirmed.

On appeal, this decree was affirmed by the United States supreme court on January 22, 1877.

It appears from your said office letter that the mandate of the supreme court has been satisfied as to the 12,128.47 acres, scrip having issued for that amount, and certificates of location filed therefor. It appears, however, that of the tracts which had been confirmed in place, amounting to 621.53 acres, patent only issued for 458.22 acres. The mandate of the court could not in full be carried out, for the reason that of the lands confirmed in place 128.11 acres thereof had long prior to the filing of the petition been disposed of by the United States.

There was an error also made by the court as to the area of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 3 S., R. 3 E., Greensburg, Louisiana, which

was given by the court as containing 75.18 acres, while it actually contained 39.98 acres, a discrepancy of 35.20 acres.

It is thus seen that there was a deficit of 163.31 acres; in other words, the court confirmed to the heirs, as lands in place under the grant, 621.53 acres, and directed patent to issue therefor, and your office can not carry out the mandate, because there is a deficit of lands in place of 163.31 acres.

It appears that one of the heirs of Garcia, through her attorney, has applied for a patent for this residue, and your office is of opinion that "the heirs and legal representatives of Manuel Garcia are entitled to additional scrip for 163.31 acres," but in view of the former holdings of your office to the contrary, the question is submitted to this Department for a decision, etc.

It is apparent that the court sustained the validity of the Garcia grant to the full extent of 15,000 arpents, or 12,750 acres. It was also, doubtless, the purpose of the court to award to the heirs of Garcia "certificates of location" equivalent in acreage to the full quantity of land within the limits of the grant then disposed of by the government. Had all the facts been before the court, it can not be doubted that under section 6 of the act of 1860 (*supra*) the court would have directed "certificates of location" for 12,291.78, which, with the 458.22 acres in place, would have filled the full measure of the grant.

Section 11 of the act of 1860 (*supra*) provides, among other things, for certain proceedings in the district court of the United States, wherein the lands claimed may lie; it also provides that, if the decree be against the United States, an appeal shall be entered to the supreme court of the United States, etc.,

which decision shall be final, and patent shall thereupon issue, if the claim shall be adjudged valid, for so much of the lands claimed as remain unsold, and for so much as may have been sold, the provisions of section 6 of this act shall apply.

Section 6 of said act provides:

That whenever it shall appear that lands claimed, and the title to which may be confirmed under the provisions of this act, have been sold in whole or in part by the United States prior to such confirmation, or where the surveyor-general of the district shall ascertain that the same cannot be surveyed and located, the party in whose favor the title is confirmed shall have the right to enter upon any of the public lands of the United States a quantity of land equal in extent to that sold by the government: *Provided*, That said entry be made only on lands subject to private entry at one dollar and twenty-five cents per acre, and as far as may be possible in legal divisions and subdivisions, according to the surveys made by the United States.

The fact that the court overestimated the acreage of the land in place, and per force of this circumstance underestimated the quantity of land for which certificates of location were to be issued, should not result in defeating the main purpose of the court, namely: to confirm the grant as a whole, and to secure to the heirs the full quantity of the land remaining in place and indemnity for the residue.

I think section 6 of said act (above quoted) clearly gives the heirs of Garcia the right to the quantity of land applied for. The mandate of the court will, therefore, be carried out by the issuance of scrip for the 163.31 acres, and entry will be allowed on lands subject to private entry at one dollar and twenty-five cents per acre as far as possible in legal divisions and subdivisions.

The decision of your office is accordingly approved.

RAILROAD GRANT—INDEMNITY SELECTIONS—SPECIFICATION OF LOSS.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* LAMBECK.

Indemnity selections accompanied by designation of loss in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the right of the company as against subsequent applications to enter, made prior to said requirement, and the rearrangement of losses in accordance therewith.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (J. I. H.) (F. W. C.)

I have considered the appeal filed on behalf of the St. Paul, Minneapolis and Manitoba Ry. Company, from your office decision of September 24, 1894, holding for cancellation its indemnity selection, list No. 15, as to lots 16 and 17, Sec. 7, T. 122 N., R. 31 W., St. Cloud land district, Minnesota, with a view to allowing the homestead application of Joseph Lambeck.

This land, it appears, is within the indemnity limits common to the grants for both the main line and the St. Vincent Extension of said road, and was selected on account of the grant for the St. Vincent Extension November 13, 1885. Its list of selections was accompanied by a list of losses equal in amount to the lands selected but was not arranged tract for tract with the selected lands.

While in this condition, to wit, on September 3, 1891, Lambeck tendered a homestead application for the land, which was rejected by the local officers for conflict with the company's selections, and he duly appealed to your office.

Under the directions given by this Department in its decision in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406), this company was, during the month of December, 1893, called upon to re-arrange its indemnity selections so as to designate, tract for tract, the lands lost in place, in lieu of which selections had been made. Acting under this call the company on June 6, 1894, filed its re-arranged list in which the same losses were used, but re arranged to show the losses tract for tract with the lands selected in its list filed November 13, 1885.

Your office decision holds that the company's selection as originally presented was invalid, and recognizes the intervening right of Lambeck.

Prior to the decision of this Department in this case of *La Bar v. Northern Pacific R. R. Co.*, *supra*, there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands, the circular of 1879 merely requiring the designation of losses made the bases for the selections.

I am therefore of opinion that the company's rights were duly protected under the selection as made in 1885, and as they have since complied with the requirement in re-arranging their losses so as to show a specific loss for each tract selected, no rights were acquired as against the grant by the presentation of Lambeck's application in 1891.

No other sufficient reason being assigned to avoid the company's selection, I must reverse your office decision and sustain the action of the local officers in rejecting Lambeck's application.

APPLICATION TO ENTER—CONTESTANT'S PREFERRED RIGHT.

STATE OF CALIFORNIA *v.* REEVES.

Applications to enter filed subject to a contestant's preferred right of entry take precedence in the order of filing, if the contestant fails to exercise his privilege.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896. (A. E.)

This is an appeal by the State from your office decision of December 28, 1894, affirming the local office in rejecting the school land indemnity selection by the State of California of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 18, Tp. 5 N., R. 10 W., S. B. M., Los Angeles, California. The selection was rejected because covered by the prior application of Albert F. Reeves.

The record shows that one Cora L. Mathiason obtained the cancellation of a desert land entry covering the N. $\frac{1}{2}$ and SE. $\frac{1}{4}$ of said Sec. 18, and that she was notified of her preference right on August 16, 1894. On August 10, 1894, before the above notification but after the decision in favor of Mathiason, one Albert Reeves applied to make desert land entry of the N. $\frac{1}{2}$ of the section. This application was held to await the expiration of the thirty days allowed Mathiason within which to exercise her preference right. On September 13, 1894, she made entry of the SE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, leaving the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the section vacant. On the same day, but just prior to the entry of Mathiason, the State of California presented its selection of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, same section. Action on this was suspended to await the action of Mathiason, and also the application of Reeves, both of whom were held to have rights superior to the State.

Mathiason having exercised her right, and left part of the land covered by the application of Reeves vacant, the local office notified him,

and on October 16, 1894, he came in and changed his application to conform with the record, and his entry was allowed for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section.

The State selection for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ was then rejected, and it appealed. On December 28, 1894, your office affirmed the local office.

The successful contest of Mathiason gave her the privilege of entering the land within thirty days after she received notice that the contested entry had been canceled. The application of Reeves held for him all land in his application subject only to the right of Mathiason. Had the land been segregated or reserved, the application of Reeves should have been rejected. A contestant's preference, however, is not a segregation of the land, but merely a right to be preferred for thirty days as against others than the government. Such a suspension of the land to entry does not prevent the filing of other applications for the land any more than the filing of a declaratory statement, and should the successful contestant fail to exercise his or her privilege, the next application in the order of filing has the preference.

In the case under consideration Reeves was clearly entitled to make entry of so much in his application as was not segregated by the entry of Mathiason, as his application was prior to the selection of the State.

Your office decision is affirmed.

RAILROAD LANDS—ACT OF JANUARY 23, 1896.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 20, 1896.

REGISTERS AND RECEIVERS,

San Francisco, Stockton, and Visalia, Cal.; The Dalles, La Grande, and Oregon City, Oregon; North Yakima, Walla Walla and Vancouver, Washington.

GENTLEMEN: Your attention is called to the act of Congress approved January 23, 1896 (Public, No. 8), which is as follows:

That "An Act to amend an Act entitled 'An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes,' approved September twenty-ninth, eighteen hundred and ninety, and the several Acts amendatory thereof," approved December twelfth, eighteen hundred and ninety-three, be, and the same is hereby, amended so as to read as follows:

"That section three of an Act entitled 'An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes,' approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said Act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That actual residence upon the lands by persons claiming the right to

purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate."

In view of this legislation, actual residence upon the lands by persons claiming the right to purchase the same under the act of 1890, *supra*, is not required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Approved February 20, 1896.

HOKE SMITH, *Secretary.*

HOMESTEAD CONTEST—CONTESTANT—CULTIVATION.

REAS v. LUDLOW.

The law does not require a person who contests a homestead entry on the ground of abandonment to possess the qualifications of an entryman. Until the contestant seeks to avail himself of the preferred right attendant upon success his qualifications will not be considered.

Planting a crop with no expectation or intention of securing a return therefrom is not compliance with the homestead law in the matter of cultivation.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (J. McP.)

Harley V. Reas has appealed to this Department from your decision "H" of July 17, 1894, dismissing his contest against homestead entry No. 7216 made by Charles S. Ludlow June 24, 1889, for the SW. $\frac{1}{4}$ of Sec. 28, T. 21 S., R. 29 E., M. D. M., Visalia, California, land district.

As the record discloses that a question of jurisdiction was presented by the defendant during the progress of the trial, it will first be considered.

Harley V. Reas, the contestant, was called as a witness by the defense, and asked his age. He stated that he was born February 28, 1873. Whereupon counsel for Ludlow moved that the contest be dismissed, for the reason that Harley V. Reas, the contestant, was under the age of twenty-one years on the 3d day of October, 1893, the day on which the affidavit of contest was filed, and that when said contest was filed, and notice issued that said Reas was a minor; that he did not appear by guardian, nor as the authorized agent of the government; that said Reas was incompetent to prosecute this suit in the Land Office, and that all proceedings taken were null and void, as such an affidavit would not confer jurisdiction on the local officers.

The action of the local officers in overruling the motion to dismiss

was correct. The law does not require a person contesting a homestead entry, on the ground of abandonment, to possess the qualifications of an entryman.

Until such person attempts to avail himself of the preference right accruing to a successful contestant, his qualification will not be considered.

There is no serious conflict as to the facts in the case.

It appears that Charles S. Ludlow, the claimant, successfully contested a previous entry embracing the land in controversy; that upon the conclusion of the former suit and the cancellation of the entry that had previously existed, Ludlow, on June 24, 1889, made homestead entry No. 7216, for the land, and in December, 1889, erected thereon a small but comfortable house, made of lumber and costing about \$26, exclusive of the labor expended on its construction; that he remained on the land at the time his house was built some two or three weeks, and began to dig a well, which on account of the difficulty encountered in the work necessary to its completion he abandoned and instead cleaned out a spring from which to procure his supply of water.

After the completion of his house Ludlow did not reside continuously on the land. He paid occasional visits thereto usually at intervals of several months, and on these visits he remained only a few days. He plowed and planted to wheat for several seasons a small portion of the land, much less than an acre in area, with no intention of reaping anything, but merely to comply with what he supposed was the requirement of the law. None of the land was fenced, and it seems that the stock of the neighbors ran at large, rendering it impossible to raise a crop on this land without fencing the portion cultivated. The tract is hilly and mountainous, partially timbered, difficult to put in a farm-like condition, and is better adapted to grazing than for agriculture. The claimant was a man of weakly constitution when his entry was made and in December, 1891, he was stricken with partial paralysis, which rendered him unfit to do any work for three months, and since that time he has been unable to perform continuous manual labor. He is unmarried, and his physical infirmities render it unsafe for him to reside alone for any considerable period. He was poor financially and could not hire the enclosing and improvement of the land, as the cost for fencing and clearing the tract was beyond his means. He was not strong enough to do the work himself and assigns this, with his financial inability to hire the work done as an excuse for his entire failure to comply with the law in the matter of cultivation.

The local officers held that under the circumstances of the case Ludlow should not lose his land. You concurred in their conclusions.

The homestead law under which Ludlow made his entry require five years' continuous residence and cultivation to entitle the entryman to patent. It declares that an abandonment of the premises for a period of six months by the entryman will work a forfeiture of his rights.

Furthermore, the act of May 14, 1880, gives to the party who successfully contests a homestead entry a preference right to make entry for said land within a prescribed time. Reas, the contestant herein, has brought this contest for the purpose of procuring the cancellation of this entry. If he has established his charges, he is entitled, under the law, to a judgment canceling Ludlow's entry. It is not a case wherein only the rights of the entryman and the government are concerned, but one in which the contestant has an interest conferred on him by statute.

Did, therefore, Ludlow abandon the land within the meaning of the statute? If so, his entry must be canceled.

That he did not cultivate and plant to crop any part of the land with the intention of harvesting, is admitted by the defense. According to the testimony of Ludlow the planting of a small portion of land—much less an acre—for several seasons, to wheat, was for the purpose of complying with the letter of the law. As the land was unfenced and subject to the depredations of the stock running at large in the community, it was not expected that any crop could be grown. Is the mere planting of a crop, with the knowledge that it will be destroyed, a compliance with the law in the matter of cultivation? I think not. The fact that the land is difficult to reduce to a state of cultivation is no excuse why some effort should not be used to comply with the requirements of the statute. Ludlow knew the character of the land, and his financial condition when he made entry of the land. He knew also the condition of his health, which, it seems, even then prevented him from doing heavy manual labor. According to the testimony of his brother Ross, he had been more or less a "charge" on the family for a period of six years prior to the hearing. His infirmity, therefore, antedated his entry, by two years. It is true that the testimony showed that since December, 1891, his condition was much more unfortunate than it was preceding that date, and indicates that it would be unsafe for him to remain alone on his homestead. But it is also true that, after the initiation of his claim, and prior to December, 1891, when he was stricken with partial paralysis, from the effects of which he had not recovered at the date of the hearing, he had not complied with the law, either as to residence or improvements. He had only paid occasional visits to the land, and so seldom were these visits, and of such short duration, that his near neighbors, who were frequently on the land, and near his house, had never seen him on the land, with the exception, perhaps, of the time his house was erected.

Whatever the hardship to the entryman may be, the conditions upon which he made his entry, imposed by the legislative department of the government, have been broken, and rights recognized by the law, other than those of the entryman and the government, have intervened; therefore your decision must be reversed, and Ludlow's entry canceled.

TIMBER CULTURE ENTRY—APPLICATION TO ENTER—EQUITABLE ACTION.

ZICKLER *v.* CHAMBERS.

An application to make homestead entry of land covered by a subsisting timber culture entry, under which final proof has not been made within the statutory period, does not confer upon the applicant the status of an adverse claimant entitled to be heard as against subsequent equitable action on the timber culture entry.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (E. B.)

The land involved is the NW. $\frac{1}{4}$ section 33 T. 3 S. R. 14 W. Kirwin, Kansas, for which Louis L. Chambers made timber culture entry No. 5274, May 29, 1879. John Zickler presented his application to enter the same land as a homestead May 31, 1892, which was received by the local officers subject to Chambers' timber culture entry. The local officers notified Chambers of their action, and allowed him sixty days to show cause why his entry should not be canceled for failure to make final proof within thirteen years from the date thereof.

On July 8, 1892, Chambers appeared with his witnesses to make final proof, and on the same day Zickler appeared by attorney and moved for a stay of proceedings and a hearing in the premises. The local officers overruled the motion, accepted Chambers' proof, and on the same day, issued their certificate for the land in his favor as a basis for patent thereto. Zickler duly appealed to your office contending that he was an adverse claimant; that Chambers had shown no sufficient excuse for his failure to make his final proof within the statutory period, and that a hearing should have been allowed to enable him (Zickler) to disprove the excuse alleged by Chambers. On November 8, 1893, your office affirmed the action of the local office and held that "Chambers' entry may be adjudicated upon equitable grounds."

In his appeal to the Department Zickler assigns error in the decision of your office as follows:

First: Error in holding that the defendant had a right to make proof, and be subject to adjudication while an adverse right to land existed.

Second: Error in not allowing a hearing to allow plaintiff to contradict the statements of the defendant as to (why) he failed to make proof within the statutory period as plaintiff alleges that the defendant did not prove up as he desired to avoid payment of taxes.

The proof submitted by Chambers shows a compliance with the law in every respect except upon the single point of submitting the same within the thirteen years allowed by the statute. In his affidavit before the local officers July 8, 1892, Chambers testified that the reason he did not submit his final proof within the statutory period was because he had applied for and was granted by the local officers in 1883, an extension for one year of the time for planting, on account of the killing of

his trees by dry weather, and that he thought he was thereby granted one year longer within which to make his final proof. Two witnesses corroborate him as to the killing of his trees which they state were replanted.

In addition to authorizing an extension of the time for planting trees, which is ordinarily included within the first four years after entry, the second section of the act of June 14, 1878 (20 Stats. 113), among other things, specifies the affidavit to be made at entry and provides that no final certificate shall be given or patent issued for the land entered until the expiration of eight years from date of entry, but that when eight years have expired, or at any time within five years thereafter, upon furnishing the proof therein required, the proper person, as therein indicated, shall receive a patent for the land. The third section of the act reads as follows:

That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead settler or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases.

As this section was intended, in a proper case for its application, to work a forfeiture, it will be strictly construed against any "other person" seeking thereunder to oust a timber culture entryman. It evidently contemplates that the validity of the subsisting entry may be attacked only by the institution of a contest. See paragraphs 28 and 29 of the regulations under the said act approved July 12, 1887 (6 L. D. 284). Zickler did not attack Chambers' entry in any way, so far as appears, when he presented his application. He has never filed any affidavit except his own preliminary homestead affidavit. He alleged nothing against Chambers' entry at that time, nor gave him any notice as required by the proviso to the third section of the timber culture act aforesaid. The notice to Chambers to show cause was given by the local officers, apparently *suo motu*, and was just such notice, in substance, as they might properly have given without any one offering a homestead or timber culture affidavit for the land.

The only defect in Chambers' entry was the failure to make final proof during the statutory life thereof, and that was a matter of record. The filing of the application, alone, by Zickler, gave him no adverse right whatever against Chambers' entry. While it stood intact of record the entry was an appropriation of the land against all claimants. Zickler could not attain the status of an adverse claimant until he had instituted a contest against the entry in accordance with the rules of practice (Rules 1 to 3). In a case similar to this (*Walker v. Snider* (on review) 19 L. D. 467) involving a homestead entry, although

Walker presented a homestead application and an uncorroborated affidavit of contest, he was still held to be only a protestant against Snider's entry. Zickler must be regarded as occupying the same position as to Chambers' entry. The defect in his entry is a matter between him and the government alone.

The allegations in Zickler's appeal that Chambers had been advised by some one that he must make final proof within thirteen years notwithstanding the extension of a year in the time for planting trees, that he delayed making final proof to avoid paying taxes on the land, and that his entry was made for a speculative purpose, unsupported as they are by any evidence whatever, and in the presence of the good faith shown generally by Chambers, were properly ignored by the local officers and by your office. The hearing asked while Chambers' final proof was being made, without any foundation laid therefor, was properly refused by the local officers. The decision of your office is affirmed. Chambers' entry will be submitted to the board of equitable adjudication.

TIMBER CULTURE ENTRY—COMMUTATION—EXTENSION OF TIME FOR PAYMENT.

THEODORE A. SLOANE.

No provisions of law exist for extending the time within which payment may be made in the case of commuted timber culture proof.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (C. J. G.)

On June 8, 1887, Theodore A. Sloane made timber culture entry for the SE. $\frac{1}{4}$ of Sec. 13, T. 21 S., R. 66 W., Pueblo land district, Colorado.

By your office letter of June 14, 1892, the contest of one Martin Hughes against said entry was dismissed, and the case was finally closed by your office letter of March 30, 1894.

September 12, 1892, Sloane made final proof (commutation) duly corroborated by witnesses, showing compliance with law for four years next following date of entry and destruction of the trees the third year by extreme drought.

April 11, 1894, Sloane was notified that he would be allowed ten days within which to pay for the land. May 21, 1894, Sloane, through his attorney, made application for an extension of thirty days, on account of temporary financial embarrassment, in which to furnish the purchase money. May 22, 1894, this request was granted, and Sloane was notified at the same time that a failure to furnish the purchase money and complete his entry within the time specified would cause the rejection of his final proof. No further action having been taken by either Sloane or his attorney the final proof was accordingly rejected on July 10, 1894. An appeal was taken to your office, and by letter of

October 2, 1894, you sustained the action of the local office. The basis of your decision was "that no provisions of law exist for extending the time within which payment may be made, in the case of commuted proof under the timber culture act."

A further appeal brings the case to this Department, and the following errors are assigned:

1. In not finding that claimant's failure to pay the price of said land was due to unfortunate circumstances beyond his control.
2. In not holding that it was within the discretionary power of the Department to make extension of the time to enable claimant to make payment for the land.

Sloane claims that he has tried his best to comply with the timber culture law, and that he spent over \$190 in fencing, breaking, planting, and taking care of this land. There is no evidence to contradict this statement and it is probably true. He does not explain, however, his failure to take any action, either in complying with the law or showing his inability to do so, during the thirty days allowed him within which to pay the purchase money. In view of the circumstances it may be a hardship to cancel his entry, yet this Department, in the absence of any remedial legislation in such cases, is unable to grant him relief. The relief sought is not within the discretionary power of the Department. No relief of this character has been or can be extended to any class of entrymen without due authority of law. No such authority exists for an extension of the relief sought in the case at bar. Congress, at various times, has passed remedial acts for the benefit of entrymen, but by reference to said acts it will be seen that legislation has been confined to homestead, desert land and pre-emption entrymen, who, by reason of failure of crops for which they are in no wise responsible, have been allowed an extension of time within which to make payment. The language of the acts is specific and the reasons for their passage are clearly stated. Thus, a joint resolution of Congress, approved September 30, 1890 (26 Stat., 684), provides:

That whenever it shall appear by the filing of such evidence in the offices of any register and receiver, as shall be prescribed by the Secretary of the Interior, that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

Again, the act of Congress, approved July 26, 1894 (28 Stat., 123), provides:

That the time of making final proof and payment for all land located under the homestead and desert land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby extended for the period of one year from the time proof and payment would become due under existing law.

That the time of making payments on entries under the pre-emption act is hereby extended for one year from the date when the same becomes due in all cases where pre-emption entrymen are unable to make final payments from causes which they

can not control, evidence of such inability to be subject to the regulations of the Secretary of the Interior.

The instructions issued under the joint resolution of Congress of September 30, 1890, were directed to be followed under the act of Congress approved July 26, 1894, except that under the latter act, instead of setting forth the facts relating to failure of crops, the applicant for such extension was required to set forth the causes which render him unable to make the necessary payment. But there was no change in the act itself of the designation of lands to which the act was intended to apply. There was, in these acts, a specific enumeration of lands located under the homestead, desert land and pre-emption laws. It will thus be seen that this remedial legislation is limited to the classes of cases above specified.

It has been decided by the Department in various cases that final proof and payment must be made at the same time (3 L. D., 188), Lottie Merwin (5 L. D., 221); Ida May Taylor (6 L. D., 107); R. M. Barbour (9 L. D., 615); In Morris Collar, (13 L. D., 339), it was held that the timber culture act does not contemplate an extension of the statutory period within which final proof is required. As final proof and payment must be made at the same time it follows that there can be no extension of time within which payment is required.

Your decision is hereby affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—FINAL PROOF—SPECIAL NOTICE.

SOUTHERN PACIFIC R. R. CO. *v.* FLIPPEN.

During the pendency of an application to select a tract as indemnity under a railroad grant, no action should be taken on the final proof of a settler without special notice to the company.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 21, 1896. (E. M. R.)

This case involves the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 15, T. 25 S., R. 30 E., Visalia land district, California.

The record shows that on January 5, 1891, the Department in the above entitled case rendered a decision suspending the pre-emption claim of Mrs. Nancy A. Flippen to the above described land until final action was had by the local officers upon the appeal of the railway company from the rejection of its application to select said tract, as indemnity, by the local officers, per list No. 23.

On January 10, 1895, your office decision was rendered, dismissing the appeal of the company from the rejection of said list No. 23, it appearing that the company had presented a new list of selections embracing the lands covered by said list.

The land in controversy covered by the pre-emption filing of Mrs. Flippen, is embraced, so your office decision states, in list No. 56,

indemnity selections, approved on May 10, 1892. The rights of the company, however, relate back to December 9, 1885, the time of the filing of the first application to select said lands.

On March 6, 1886, the pre-emption claimant filed a declaratory statement for the tract in question, together with the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22, and after publication of notice submitted proof thereon on October 4, 1886, alleging settlement in January, 1885.

In the former judgment of this case (12 L. D., 18) it was said:

The lands within the indemnity limits having been restored, the right to file for said tract depends upon the validity of the selection of the company. If that is invalid for any reason, then Mrs. Flippen can be permitted to make pre-emption entry of the land. The company having an appeal pending involving its right to said tract, no action could be taken without special notice to it. *Southern Pac. Railroad Co. v. Reed*, 4 L. D., 256. Indeed the proper practice is to suspend the filing and proof until the final disposition of the appeal of said company now pending before your office.

Mrs. Flippen, however, may be allowed to intervene under the rules of practice.

In the appeal from your office decision of February 19, 1895, in favor of Mrs. Flippen, the railroad company urges that it had never had its day in court, and that it was entitled to special notice, being an adverse party of record, of the making of final proof by the defendant.

It appears that under the judgment heretofore rendered by the Department in the case, the railroad company is entitled to such notice, and the case is therefore remanded with direction that you instruct the local office to notify the parties that a period of thirty days will be granted within which the railroad company will be allowed to introduce evidence to contradict the testimony of the witnesses of Mrs. Flippen at the time of her offering final proof, and at such time she will also be allowed, if she so desires, to submit proof in behalf of her claim, after which time the case will be treated by the local office and your office as special.

The opinion appealed from is accordingly reversed.

RAILROAD GRANT—WITHDRAWAL—HOMESTEAD ENTRY.

SOUTHERN PACIFIC R. R. CO. *v.* PALM ET AL.

An entry allowed at a time when the land is embraced within a withdrawal on general route is not void, but voidable, and, if subsequently on the readjustment of the grant, in conformity with the constructed line of road, the land falls within the indemnity limits, the entry may stand with a view to equitable action thereon.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ of Sec. 21, T. 16 S., R. 14 E., and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 23 S., R. 17 E., Visalia land district, California.

The record shows that on November 15, 1887, Andrew Palm made homestead entry for the first described tract, and on the 18th day of February, 1889, Willard C. Welch, jr., made timber culture entry for the last described tracts. Subsequently to the allowance of these entries the Southern Pacific Railroad company filed its formal protest against their allowance.

On December 22, 1894, your office rendered a decision in which it sustained the entries of the defendants.

It appears that the land covered by the two entries is within the primary limits of the grant to the Southern Pacific Railway company, under the act of July 27, 1866 (14 Stat., 292), as is shown by the withdrawal made in behalf of that road in 1867, on the map of general route.

November 12, 1889, a map showing the definite location of the completed section of the road opposite this land, was filed, when it was ascertained that upon the re-adjustment of the grant in conformity to the road as constructed, the tracts in question fell outside of the primary, but within the indemnity, limits of the railroad.

It will thus be seen that at the time the entries were made the lands were withdrawn and not subject to appropriation under any of the public land laws. From this it would follow that the entries when allowed were erroneously so allowed, but the question for disposition here is, whether, owing to the subsequent falling of the tracts within the indemnity limits where the entries have been already allowed, even though erroneously so, such entries should not be allowed to stand. The equivalent to this proposition is: was the allowance of an entry upon lands withdrawn for any purpose, a void or voidable act? I am of the opinion that it was merely voidable, and I so hold.

The authorities cited by the applicant are only to the extent of saying that there can be no disposition made of lands covered by a withdrawal. Certainly there can be no final disposition of lands during the existence of such withdrawal, and were the lands still withdrawn the entries would have to be canceled; but such is not the case. The railroad company's rights under the withdrawal have terminated so far as these tracts are concerned. Nor can it be said that because of the mere fact that there is a deficiency in the grant to the Southern Pacific Railroad company, no selection is necessary within its indemnity limits. The case of *St. Paul and Pacific v. Northern Pacific R. R. Co.* (139 U. S., 1), only held that as between railroad companies, such selection was unnecessary where the grant was deficient. This being the case, the entries therefor having been erroneously allowed, and being thereby only voidable and not void, they attached at the moment the lands fell within the indemnity belt of the Southern Pacific Railroad company. It appears that these entries when final proof is made upon them, inasmuch as they were erroneously allowed, could be referred to the board of equitable adjudication.

The decision appealed from is therefore affirmed.

INDIAN HOMESTEAD—CITIZENSHIP—ACT OF FEBRUARY 8, 1887.

TURNER *v.* HOLLIDAY.

An Indian born within the United States who has abandoned the tribal relation, and adopted the habits and customs of civilized life, is a citizen of the United States, and as such, entitled to the exercise of the rights accorded under the general homestead law.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (J. A.)

I have considered the appeal of William H. Turner from the decision of your office of June 23, 1894, dismissing his protest against the commutation final proof offered by James H. Holliday on his homestead entry made November 18, 1891, for the SE. $\frac{1}{4}$ of Sec. 10, T. 50 N., R. 37 W., Marquette land district, Michigan.

The tract in question is within the limits of the railroad grant of land restored to the public domain by the act of March 2, 1889 (25 Stat., 1008). May 1, 1889, William H. Turner presented pre-emption declaratory statement, alleging settlement April 17, 1889, and James H. Holliday presented homestead application. Both applications were held to await decision on the claim of the Ontonagon and Brule River Railroad Company to said land, and were allowed on November 18, 1891, after decision adverse to said company.

Holliday offered commutation proof February 3, 1892, against which Turner protested, alleging that he is the prior settler.

Hearing was had before the local officers and much testimony was submitted on the issue raised by Turner's protest. Testimony was also introduced showing that Holliday is a Lake Superior Chippewa Indian and was born in 1862 in the State of Michigan, of which State he is now a resident; that he has received a patent to eighty acres of land as a member of the Chippewa tribe of Indians; that he pays no taxes on said land; that he has adopted the habits and customs of civilized life; and that the Chippewa Indians have dissolved their tribal relations and are not subject to the control of any chief.

The local officers found that Holliday is the prior settler, and held that he is a qualified entryman. They therefore recommended the dismissal of the protest, and the acceptance of Holliday's commutation proof.

On the contestant's appeal your office, in the decision appealed from, held that Holliday is a qualified homesteader under section 2289 of the Revised Statutes. On the question of the respective settlement rights of the parties, your office found that Turner staid on the land about two weeks in July, 1889, since which time he has maintained a residence elsewhere; and that Holliday is a *bona fide* settler on the land. The decision of the local officers was therefore affirmed.

The appeal assigns error in holding:

1. That Holliday is qualified to make homestead under section 2289, Revised Statutes.
2. That Turner's residence on the land for two weeks in July, 1889, is not a sufficient compliance with the requirements of the pre-emption laws.

Turner has abandoned his residence on the land and cannot be heard on his claim of prior right.

The first assignment of error is based on the assumption that Holliday is not a citizen of the United States. Under section 6 of the act of February 8, 1887, (24 Stat., 388) Holliday is a citizen of the United States. He is a *bona fide* resident on the land, and is entitled to patent on his commutation proof. Turner's protest must be dismissed. The decision appealed from is accordingly affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

BROWN v. WYMAN.

The right of one holding under a contract of purchase from a railroad company to perfect title under section 5, act of March 3, 1887, is not affected by the fact that said contract is neither acknowledged nor recorded; nor can the subsequent purchase of a tax title to said land by the applicant be regarded as such an abandonment of his contract as would defeat his right of purchase under said act.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (F. W. C.)

I have considered the appeal of Richard J. Brown from your office decision of April 5, 1894, holding for cancellation his homestead entry covering the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 35, T. 3 S., R. 70 W., Denver land district, Colorado, with a view to allowing the application of Moses Wyman to purchase said land under the fifth section of the act of March 3, 1887.

This land is within the limits of the grant to the Union Pacific Railroad Company and on August 30, 1892, Brown tendered a homestead application for this land, which was refused by the local officers for conflict with said grant.

Upon appeal, your office decision of April 4, 1893, reversed the action of the local officers holding the land to be excepted from the grant, which decision became final, and as a result thereof Brown made homestead entry for the land in question July 21, 1893.

Prior to the acceptance of said entry, to wit, on June 27, 1893, Moses Wyman gave notice by publication that he would on August 9, 1893, make proof of his right to purchase this land under the fifth section of the act of March 3, 1887 (24 Stat., 556).

At the time set Brown appeared and protested against the allowance of the purchase by Wyman and hearing was duly held.

There seems to be little dispute as to the facts in the case, Wyman basing his right to purchase upon a contract entered into with the company for the purchase of the entire NE. $\frac{1}{4}$ of said section 35, which contract bears date of July 2, 1883.

This paper does not appear to ever have been acknowledged, although signed by the land commissioner of the company and countersigned by the secretary thereof. It recites that at the time of entering into said contract he paid in cash \$91.28 on account of said purchase, which was made at the rate of \$3.50 per acre. Under the terms of the agreement the money was to be paid in eleven annual payments, the last falling due on July 2, 1894. Wyman claims to have made the annual payments up to and including July 2, 1892.

Brown does not appear to have ever established an actual residence upon the land, although certain improvements appear to have been made thereon at his instance. He objects to the evidence of purchase offered by Wyman upon the ground that the instrument was never acknowledged nor recorded prior to the date of his homestead entry, and further, that while Wyman was, under the terms of the agreement, required to pay the taxes upon the land, it appears that in October, 1892, he purchased a tax title for this land from Jefferson county, for the taxes of 1887 and accruing taxes, and that after that date he made no further payment to the railroad company.

It is clear that Brown has no such right under his homestead claim as would defeat Wyman's claimed right of purchase, in the event that he has established such right under the terms of the act of 1887. The fact that the contract of purchase was not acknowledged nor recorded does not, to my mind, in anywise interfere with the right of purchase under the act of 1887, nor does the fact that in 1892 he purchased a tax title to this land constitute such abandonment of his contract as would prevent his claimed right of purchase under said act.

From a review of the matter I therefore affirm your office decision, and upon completion of purchase by Wyman, Brown's entry will be canceled.

CONTEST—RES JUDICATA—ACTION ON BEHALF OF THE GOVERNMENT.

MOORES *v.* SOMMER.

Though a contest will not be allowed on a question that has formed the basis of a prior adjudication between the same parties, such fact will not prevent the government from canceling the entry in question if it is clearly illegal.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (G. B. G.)

The land involved in this appeal is the NW. $\frac{1}{4}$ of section 27, T. 12 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

April 24, 1889, one Samuel L. Beidler made homestead entry of this land.

May 31, 1889, Christian F. Sommer applied to contest Beidler's entry.

June 27, 1889, one Lucien H. Barlow, filed an affidavit of contest alleging that both Beidler and Sommer were sooners.

October 28, 1889, Beidler relinquished his entry, whereupon Sommer applied to make homestead entry. His application was rejected by the local officers for the reason, endorsed on the application, that he informed them at the time of applying to enter, that he was in the Territory opened to settlement on April 22, 1889, and that he settled on the land in question before anybody could reach the same from any point on the boundary of the Territory.

From that action he appealed to your office.

November 27, 1889, one James H. Carter was allowed to make homestead entry, subject to the rights of Sommer.

There were several other claimants, and other contestants, but as no rights are now asserted through or under them, their record need not be set out.

On January 21, 1890, your office suspended action on Sommer's appeal from the rejection of his application to enter the land, and ordered a hearing to determine the rights of all the parties and claimants. At the hearing the local officers dismissed Barlow's affidavit of contest, and he appealed.

On December 22, 1890, Carter relinquished his entry, whereupon one Welleston H. Belcher was allowed to make entry.

In February, 1889, the local officers rendered decision holding that the relinquishment of Beidler, the first entryman, was the result of Sommer's contest; that Sommer is a qualified entryman, and recommended that Belcher's entry be canceled, and that Sommer's homestead entry be allowed. Belcher relinquished his entry May 20, 1891, and at the same time Thomas J. Moores, presented a homestead application, which was rejected by the local officers, from which action Moores appealed to your office.

On January 22, 1891, your office considered together the appeals of Sommer, Barlow and Moores, and affirmed the action of the local officers, dismissing Barlow's affidavit of contest, and rejecting Moores' homestead application, and their decision recommending that Sommer's homestead application be allowed.

Barlow appealed to the department, but Moores did not.

In considering the questions involved in this appeal, the Department, under date of August 19, 1892, after setting out at length the facts as they appeared of record, affirmed the decision appealed from, and said—

I think under the ruling of *Taft v. Chapin* (14 L. D., 593), Sommer was a qualified entryman at the date he presented his application, and as shown by the record before me, was the first qualified person to tender an application to enter after the cancellation of Beidler's entry.

On September 16, 1892, Moores was allowed to make homestead entry, subject to Sommer's preference right.

October 1, 1892, Sommer's homestead application was allowed.

On October 25, 1892, your office transmitted a motion on the part of Thomas J. Moores for a review of said decision of the Department rendered on the 19th of August, 1892, and January 19, 1893, said motion was denied by the Department (16 L. D. 60) for the reason Moores had no standing here, having failed to appeal from your office decision adverse to him; but said, among other things:

With the motion for review, copies of a large number of affidavits are filed, the affiants nearly all testifying that Sommer was in the Territory of Oklahoma prior to the 22d of April, 1889; that he was there at 12 o'clock, noon, on that day, and that he made settlement on the land in question immediately after that hour, and in violation of the statute and the President's proclamation. That question can not be properly determined upon *ex parte* affidavits, on a motion for review, but should be settled by contest. So far as appears the entry of Sommer has never been contested, and a contest could not, therefore, be prevented on the ground that he had already defended his entry against the same or similar charges. * * *

While in the motion before me Moores makes a showing which, if made by a contestant, would require the entryman to satisfactorily defend his entry, or submit to its cancellation, he does not make a showing which entitles him to have the decision complained of reviewed and reversed.

On February 16, 1893, Moores' entry was canceled.

On February 21, 1893, he filed a protest against the cancellation of his entry, and a contest against Sommer's entry.

In his affidavit of contest he alleges that Sommer was in Oklahoma Territory at 12 o'clock, noon, of April 22, 1889, and that he took advantage of his presence in the Territory by settling on the land in question immediately after 12 o'clock on that day, and before anybody could reach the land from any point outside of the limits of the Territory; and further that Sommer has abandoned the land for more than six months.

These papers were rejected by the local officers, who assigned as the reason for their action, that the question had been adjudicated. On Moores' appeal the action of the local officers was affirmed by your office, on June 24, 1893. A motion for review was denied on October 20, 1893.

Moores' appeal from the decision of your office brings the case before me for determination.

The appellant assigns a number of specifications of error but there is only one question in the case,—Have Sommer's rights become final by adjudication?

The admitted facts of the case disqualify him under the ruling of the supreme court of the United States in the case of *Smith v. Townsend*, and under the present holdings of the Department; but if his rights have been finally adjudicated when a different construction of the law obtained, the decision which fixed those rights can not now be disturbed.

It is urged, substantially—

1st. That the rule, *res judicata*, does not apply to this case for the

reason that a different cause of action is presented, and different parties now appear.

2d. That said departmental decision of August 19, 1892, was obtained by fraud on the part of Sommer.

3d. That by said departmental decision of January 19, 1893, in effect, a hearing on Moores' charges was ordered, and that this is but a continuation of the original controversy.

4th. That the present affidavit of contest charges abandonment, and that a hearing should be ordered on this charge.

The doctrine of *res judicata* has always been observed by the Department; indeed, it has been broadened here by departmental holdings to the effect that an entryman cannot be required to defend his entry more than once against the same or similar charges, thus, in effect, eliminating that feature of *res judicata*, which requires identity of parties. But does not this case come within the more technical rules of the doctrine itself? Here is identity in the thing sued for, of the cause of action, of the parties to the action, and of the quality in the persons. The same land is in controversy. Moores was a party to the original action, the cause of action was the alleged disqualification of Sommer for precisely the same reason as now alleged, and the parties are acting substantially in the same capacity. It is true, that Sommer at that time was not defending an entry, but he was doing what amounts to the same thing,—defending his right to make entry, and Moores was a party, he having at that time an application to enter the land, which depended for its force on the disqualification of Sommer; and all these matters were determined by your office at the same time. Moores did not appeal from your office decision, but his failure to exercise his right to do so does not make the decision of the Department any the less binding upon him.

I find nothing in the record to sustain the charges that said departmental decision of January 19, 1893, was obtained by fraud. It is true that Sommer admitted in the outset that he settled on the land in question on April 22, 1889, and before anybody could reach the same from any point on the boundary of the Territory. It is also true that Sommer on the witness-stand stated that his settlement began on the 23d day of the month, instead of the 22d. Whether by changing this statement of fact he intended to bring himself within the rule of "advantage gained" does not appear; but it is urged that they were inconsistent statements, and one or the other false. An examination of the evidence on this point shows that the statements are not necessarily inconsistent, it appearing that he did actually go to the tract in controversy on the 22d, but performed no act of settlement until the 23d. Besides all these facts were fully brought to the attention of the Department, at the time the aforesaid departmental decision of August 19, 1892, was rendered. This appears conclusively from the opinion itself, it being therein found: "He (Sommer) was on the land in controversy after noon

on April 22, and probably with the intention of selecting it. On the 23d he hauled some building material on it with the intention of building." Nor am I able to agree with the contention that the effect of the decision of January 19, 1893, was to order a hearing. There was no question of Moores' right to contest Sommer's entry before the Department at that time, it being simply a question as to his right to be heard on his motion for review of a departmental decision, he having lost his standing before the Department by failing to appeal from a decision of your office adverse to him. The holding in said decision, that a contest would lie against Sommer's entry on the ground of "soonerism" is purely *dicta*, and concludes no man's rights, nor is it authority for any action based thereon.

There is one remaining question: Should a hearing be ordered on the charge of abandonment? This charge does not appear to have been directly passed on in any of the decisions heretofore rendered. An examination of the record, however, shows that it was in issue at the original hearing herein, and that Sommer was examined and cross-examined thereon, and the evidence shows that he had not abandoned the land. The present charge of abandonment is indefinite, and it is impossible to ascertain whether it relates to abandonment before or since his entry. If it was before, the question has been adjudicated, it being a well-settled rule that all questions that were in issue and might have been adjudicated can not be made the grounds of any subsequent action.

It follows that a contest by Moores does not lie against Sommer's entry, and the same is hereby dismissed.

It is clear, however, that under the decision of the supreme court in the case of *Smith v. Townsend* (*supra*), that Sommer can never perfect title to the land in controversy. He could not offer to make final proof without committing perjury. The doctrine of *res judicata* has no application as between Sommer and the government.

I have therefore to direct that his entry be canceled, and the land disposed of to the first legal applicant. The entryman will technically be entitled to notice to show cause.

Your office decision is so modified.

PRACTICE—NOTICE OF CONTEST—SERVICE BY REGISTERED MAIL.

JOHNSON *v.* BOZARTH.

Notice of contest served on resident defendants by registered mail is not personal service within the meaning of Rule 9 of Practice.

Objection to the jurisdiction of the local office, on the ground that the notice of the contest was not properly served, is not waived by proceeding to trial after a motion to set aside the service is overruled and exception taken.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (E. E. W.)

STATEMENT.—On the 30th of August, 1892, H. C. Bozarth made desert land entry of the SE. $\frac{1}{4}$ Sec. 22, T. 14 N., R. 18 E., at North Yakima, Washington, and on the 31st of August, 1893, O. W. Johnson filed affidavit of contest, alleging that Bozarth had failed to expend one dollar per acre, or any other sum, in reclamation or improvement of the land, or to make proof thereof, within one year from the date of his entry, as required by the act of Congress of March 3, 1891.

After some proceedings not necessary to recite here, a hearing was set for April 4, 1894, and notice served on Bozarth by registered mail. At the hearing Bozarth appeared specially by attorney and moved to quash the notice for the reason that it had not been legally served. The register and receiver held that service by registered letter constitutes personal service, and overruled the motion, to which Bozarth excepted, and caused his exceptions to be noted of record. He then filed a motion for a continuance of the case until the 10th of April, which was granted. When the case was called on that day he appeared in person and by attorney and cross examined Johnson's witnesses, but declined to offer any testimony himself. The register and receiver found for the contestant, and recommended cancellation of the entry. Bozarth appealed, and the 31st of October, 1894, the Commissioner of the General Land Office affirmed the decision of the register and receiver, holding that the service of the notice by registered mail was not personal service within the meaning of the rules of practice and gave the Department no jurisdiction over the person of the contestee, but that Bozarth waived this defect in the service by participation in the proceedings after his motion to quash was overruled, that the proof showed that the entryman had failed as charged in the affidavit of contest to make the expenditures required by law, and that the entry should be canceled. From this decision Bozarth has appealed to the Department, alleging that the Commissioner erred, (1) in holding that he waived the defect in the service by participating in the proceedings after his motion to quash had been overruled, and (2) in considering the testimony offered by Johnson, and holding the entry for cancellation.

OPINION.—The Commissioner erred on both points. The motion to

quash was improperly overruled. Rule 9 of the Rules of Practice requires personal service of notice of contest on resident defendants, and the Department has held in the cases of *United States v. Raymond*, 4 L. D., 439, *Driscoll v. Johnson*, 11 L. D., 604, *Elting v. Terhune*, 18 L. D., 586, *Mott v. Coffman*, 19 L. D., 106, and other cases, that service by registered mail is not personal service within the meaning of the rule. And in the cases of *Milne v. Dowling*, and *United States v. Raymond*, 4 L. D., 378 and 439, the Department has expressly held that objection to jurisdiction is not waived by proceeding to trial after motion to set aside the service is overruled, and exception taken. This rule is also distinctly recognized in the cases of *Elting v. Terhune*, 18 L. D., 586, and *Mott v. Coffman*, 19 L. D., 106. It is true that the Department assumed jurisdiction in both of these cases and rendered final decisions on their merits, but it was expressly stated that this was done under the supervisory administrative authority vested in the Secretary, and because in each case there had been a full trial, and a complete record sent up, and it did not appear that the rights of either party would be prejudiced by an immediate final determination. In this case, however, there was not a full trial. The contestee stood upon his objection to the service of notice, and declined to introduce testimony.

In the case of *Harkness v. Hyde*, 98 U. S., 476, the supreme court of the United States says:

The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed waived.

And as jurisdiction had not been obtained, either by service or waiver, it follows that the decisions of the offices below on the merits of the case were without authority, and must be set aside and vacated.

The decision of the Commissioner of the General Land Office is reversed, and the case will be remanded for notice and hearing according to the Rules of Practice.

C. W. MORRIS.

Motion for review of departmental decision of December 4, 1895, 21 L. D., 482, denied by Secretary Smith, February 21, 1896.

RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

NORTHERN PACIFIC R. R. CO. *v.* MCFADDEN.

The confirmatory operation of section 1, act of April 21, 1876, is not defeated by an order of cancellation that becomes final for want of appeal prior to the passage of said act, nor by the notation of said order on the records after the passage thereof.

The ruling announced in the case of the Northern Pacific R. R. Co., 20 L. D., 191, modified.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 21, 1896. (F. W. C.)

I have considered the petition forwarded with your office letter of October 23, 1895, filed on behalf of George C. McFadden, invoking the supervisory power of this Department and asking further consideration of the case of the Northern Pacific R. R. Co. *v.* George C. McFadden, involving the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 31, T. 7 N., R. 2 E., Helena land district, Montana.

This case was first considered in departmental decision of May 18, 1895 (L. and R., 308), upon appeal by the Northern Pacific Railroad Company from your office decision of November 15, 1889, holding for re-instatement the homestead entry of McFadden as to the tract above described.

This land is within the limits of the withdrawal upon the filing of the map of general route of the main line of said road, which map was filed February 21, 1872.

The order of withdrawal issued by your office on account thereof was received at the local office May 5, 1872. Prior to the receipt of said order of withdrawal, to wit, on March 5, 1872, McFadden was permitted to make homestead entry, by the local officers, covering the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 30, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 31, T. 7 N., R. 2 E., which entry was held for cancellation by your office letter of November 20, 1874, as to the tract in the odd numbered section, for conflict with the withdrawal made on account of the railroad grant, and the entry was formally canceled by your office letter of May 2, 1877.

On April 29, 1879, McFadden made proof upon the entry as to the tract in Sec. 30, for which he received final certificate and upon which patent has since issued.

The line of the company's road was definitely located opposite this land July 6, 1882. On July 6, 1883, the local officers transmitted an application by McFadden for the re-instatement of his entry as to the tract in the odd numbered section, said application being based upon the provisions of Sec. 1 of the act of April 21, 1876 (19 Stat., 35).

Upon this application numerous proceedings were had resulting in your office decision of May 15, 1889, which held, as before stated, that the entry by McFadden should be re instated.

From this decision the company appealed and in departmental deci-

sion of May 18, 1895, before referred to, your office decision was reversed and the application for re-instatement denied upon the ground that as McFadden failed to appeal from your office decision of November 20, 1874, holding his entry for cancellation, the same became final at the expiration of the time allowed for appeal and that the act of entering upon the records the formal cancellation of the entry was not necessary for the finality of the judgment of cancellation, so that it was held that McFadden's entry as to the tract in question was canceled prior to the act of April 21, 1876, *supra*.

This action was taken under the authority of the decision of this Department in the case of the Northern Pacific Railroad Company (20 L. D., 191).

McFadden filed a motion for review of said decision but as nothing new was set up therein the same was accordingly denied by departmental decision of July 20, 1895.

The present petition is in the nature of a motion for re-review and is based upon the ground that no notice was ever received by McFadden of your office decision of November 20, 1874, holding his entry for cancellation.

This motion was duly served upon the company and it has filed its answer thereto, so that the case may be considered in its present condition.

As before stated, the decision of May 18, 1895, overruling the action of your office in holding for re-instatement McFadden's entry as to the tract in the odd-numbered section, was based upon departmental decision of March 12, 1895, *supra*.

In that case the Northern Pacific R. R. Co., attempted to list, on account of its grant, a tract formerly embraced in the entry of one Silas H. Murray. Murray's entry was made after the filing of the map of general route but before notice of the order of withdrawal thereon was received at the local office.

On November 22, 1874, his entry was held for cancellation for conflict with the company's grant and although he failed to appeal therefrom, his entry was not finally canceled upon the records until March 4, 1890.

The company listed the land December 21, 1886, its list being rejected by the local officers for conflict with Murray's entry, and this action was sustained by your office decision of March 4, 1890, in which it was held, following the decision in the case of said company against Burns (6 L. D., 21), that Murray's entry was capable of confirmation under the act of April 21, 1876 (19 Stat., 35), and it therefore served to except the tract from the grant.

The company appealed, said appeal being considered in the decision of March 12, 1895 (*supra*), in which the decision in the case of Northern Pacific R. R. Co. v. Burns (*supra*) was overruled, and it was held:

The confirmation of entries under section 1, act of April 21, 1876, is solely for the
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benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant in favor of any other settler.

This was the only question considered in said case, and the holding thereon is adhered to. Murray having been afforded an opportunity to apply for confirmation under the act of 1876, and having failed to respond, no question was presented by the record as to his right of confirmation, nor was it material when the judgment holding his entry for cancellation became final, or whether the entry by Murray was to be considered as canceled or uncanceled at the date of the filing of the company's map of definite location.

In the case of Southern Minnesota Ry. Co. *v.* Bottomly (4 L. D., 208), Bottomly's entry was held for cancellation by your office decision of March 14, 1874, and upon appeal the same was affirmed October 23, 1874.

Correspondence was opened with the company looking to securing its relinquishment under the act of June 22, 1874, and the judgment was never executed, that is, the entry was never finally canceled upon the records, and by departmental decision of October 31, 1885, said entry was held to be confirmed under the act of April 21, 1876.

In the case of Knapp *v.* Northern Pacific R. R. Co. (11 L. D., 85), it was held:

An entry made in good faith by an actual settler within the limits of a railroad grant prior to the time when notice of withdrawal is received at the local office, and under which due compliance with law is shown, is confirmed by section 1, of the act of April 21, 1876, and the cancellation of such entry, prior to the passage of the act will not defeat the confirmatory operation thereof.

It has been repeatedly held that a settlement made before notice of the withdrawal is received at the local office is protected by the act of April 21, 1876 (*supra*). See Jacobs *v.* Northern Pacific R. R. Co. (6 L. D., 223); Kimberland *v.* Northern Pacific R. R. Co. (8 L. D., 318); and Catlin *v.* Northern Pacific R. R. Co. (9 L. D., 423).

In view of these repeated rulings extending the protection granted by the act of April 21, 1876, to settlement claims and to entries ordered canceled, and actually noted as canceled upon the records, I must hold that the cancellation upon the record of McFadden's entry in 1877 does not bar extending to him the protection granted by the act of April 21, 1876. I therefore recall the previous decision of this Department, and for the reasons herein given, your office decision of November 15, 1889, holding for reinstatement McFadden's entry as to the tract in the odd-numbered section, is affirmed, and so far as the decision of March 12, 1895 (20 L. D., 191), may be in conflict herewith, the same will not be followed. The company's claim to this tract will stand rejected.

RAILROAD GRANT—DIAGRAM OF LIMITS.

MCLEAN v. UNION PACIFIC R. R. CO.

The limits of a railroad grant as shown on a diagram recognized for a long term of years by the General Land Office, and upon which the grant has been practically adjusted, will not be disturbed.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (F. W. C.)

I have considered the appeal from your office decision of November 11, 1893, sustaining the action of the local officers in rejecting the application tendered by Kenneth McLean to enter the SW. $\frac{1}{4}$ of Sec. 31, T. 13 N., R. 14 W., Grand Island land district, Nebraska, for conflict with the grant for the Union Pacific Railroad company.

This case was first considered by your office in its decision of December 16, 1890, in which the rejection of McLean's application for conflict with the grant for said company was sustained for the reason that according to the recognized diagram showing the limits of said grant in the neighborhood of this land this tract was included within the limits, the records showing no claim to the land at the date of the attachment of rights under the company's grant, nor was there any allegation made by McLean of a claim sufficient to except the land from said grant.

In his appeal to this Department McLean alleged that this tract was without the limits of the grant for said company and in support thereof he filed a letter from the land commissioner of the company, dated April 22, 1890, in which it was stated that: "Said land is not within the limits of the grant to this company and is therefore not our land."

On June 2, 1892, said appeal was considered by this Department and in view of the allegations and showing made by McLean, the case was remanded to your office for an investigation as to whether said tract is in fact within the limits of the grant for said company there appearing to be a discrepancy between the plats on file in your office and those in the local office. In said decision it was suggested that McLean might have an opportunity to secure the company's relinquishment under the provisions of the act of June 22, 1874.

It appears that the matter was laid before the company and its relinquishment requested but that it has refused to relinquish in favor of McLean.

Upon consideration of the question as to whether the land was in point of fact within the limits of said company's grant, your office decision of February 8, 1893, held the land to be without the company's grant and rejected its claim to the same, but upon motion for review, said decision was reconsidered in your office decision of November 11, 1893, and the previous decision of your office rejecting McLean's application for conflict with the company's grant was adhered to.

Upon the question as to the location of this land with regard to the several diagrams prepared by your office, the following appears to be the facts in the case:

In January, 1866, the Union Pacific Railway company filed its map of definite location of the second hundred miles west of Omaha, opposite which the land in question is situated. According to the limits adjusted to said map of location, this land was found to be within the limits of the grant and the local officers were furnished with a diagram showing the same.

On June 19, 1866, the company filed a map of amended definite location of the second hundred miles west of Omaha, which was accepted by the Secretary of the Interior and forwarded to your office with directions to adjust the limits of the grant according to the line shown on said map.

It appears that there is a jog or set-off in the surveys between townships 12 and 13 north, which at the point nearest the land in question amounts to nearly one and a half miles. This set-off is not shown upon the paper on which the limits were adjusted to this amended map of location, which limits include the tract in question within the company's grant.

This diagram, as seen, has been recognized by your office and the grant practically adjusted thereon.

The terminal of the second hundred miles is but a short distance west of the land in question and upon the filing of the location of the third hundred miles west of Omaha, the diagram prepared in your office upon said third hundred miles, shows the limits of the grant carried east of the eastern terminal of the third hundred miles and the western terminal of the second hundred miles. Upon said diagram, however, a line was drawn due north and south at the point of junction between the second and third hundred miles until it met the outer limits of the grant where it was joined with the limit shown upon the diagram for the second hundred miles. This continuation upon the diagram adjusted to the third hundred miles shows the land in question to be just without the limits, but the same does not appear to have been the recognized diagram in use in the adjustment of this grant, the same being recognized only as to the portion of the limits shown thereon west of the terminal line drawn between the second and third hundred miles.

It appears that since this case was returned to your office you have had a new diagram prepared upon paper properly representing the actual condition of the government survey and the limits reduced to the smallest legal sub-division cut by the outer limits of the grant. According to this diagram this land is without the limits of the company's grant and, as stated in your office decision of November 11, 1893:

It also shows other tracts to which the company's title has never been questioned to be outside said limits and on the south side of the line of the road it shows a

quantity of land to be inside the lateral limits of the grant, which the company has never claimed, and which probably, has been disposed of to individuals.

According to this new diagram it is also shown that this land would be within the limits of the grant upon the first location, even upon the changed condition and an accurate adjustment.

It will thus be seen that to disturb the limits shown upon the diagram recognized for a quarter of a century in the adjustment of this grant would result in confusion of title and after a careful consideration of the matter I am unwilling to give my consent to the proposed change in the limits.

In the case of *C. W. Aldrach* (13 L. D., 572) it was held that a diagram showing the limits of the railroad grant prepared concurrently with the filing of the map of definite location and upon which the withdrawal is ordered, will not be disturbed after such withdrawal has stood unquestioned for a long term of years and rights have vested thereunder.

According to the showing made McLean is not entitled to any particular equity as he does not appear to have acted upon the company's information furnished him to the effect that the land was not within the limits of its grant and not claimed by it. While it is true that he thereupon tendered an application at the local office, the same was rejected by the local officers and he was then advised that the land was within the limits of the company's grant.

After a careful consideration of the matter I must affirm your office decision and the application by McLean will stand rejected.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

WARD'S HEIRS *v.* LABORRAQUE.

The right of purchase accorded a licensee by section 3, act of September 29, 1890, is transferable, and inheritable, and may be exercised on behalf of the heirs of a licensee.

The records of the Department disclose the fact that the Southern Pacific Railroad Company issued a circular inviting settlement upon its lands, and judicial notice of such fact may be taken in the disposition of cases involving the rights of alleged licensees thereunder.

Neither the circular issued by the company inviting settlement, nor the application of the settler thereunder, taken alone, constitute a license; but the two, when taken together, establish the right of the settler as a licensee.

The tenant of a licensee has no right as a settler that can be set up to defeat the possession of the licensee.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (C. J. G.)

A motion has been filed for review of departmental decision of December 4, 1895, involving the NW. $\frac{1}{4}$ of Sec. 15, T. 14 S., R. 7 E., San Francisco land district, California.

The land in question was included within the grant to the Southern Pacific Railroad Company, forfeited by the act of Congress approved September 29, 1890 (26 Stat., 496).

Notwithstanding said departmental decision of December 4, 1895, was a formal affirmance of the concurring conclusions of the local office and your office the full record was examined and carefully considered at that time.

The record in this case is as follows: Benjamin R. Devaul went into possession of this land in pursuance of a published invitation of the Southern Pacific Railroad Company. Devaul's application is of record in the office of said company. In 1875 and 1876 he conveyed by quit claim deed all his possessory right, title and interest in the land in controversy to William B. Ward. Ward resided on said land with his family from 1875 to 1882, when he removed to section 17, same township and range. He, however, continued in possession from 1882 to 1890. On April 11, 1890, Ward applied to the railroad company to purchase said land, and his application was duly acknowledged by the agent of the company. Under the act of September 29, 1890, this application could avail him nothing, as said application was filed subsequently to January 1, 1888, but it may be accepted as an evidence of his intention at that time.

During the summer of 1890 there was much uncertainty as to what disposition Congress would make of these railroad lands, and as to what status would be accorded persons in possession of them. In case these lands were restored to the public domain without giving those in possession an opportunity to secure title thereto by purchase, it was well known that there would probably be a rush of settlers and "jumpers" anxious to enter them. In view of this condition of affairs, about July 25, 1890, Mrs. Laborraque, the defendant herein, at the request of Ward, moved upon the land and occupied the buildings thereon. Mrs. Laborraque's son, John, was employed by Ward, and as Mrs. Laborraque could not speak English, the transaction was arranged by her son. It is shown that at the time Mrs. Laborraque went on the land in controversy there were improvements thereon valued at \$1,000, consisting of a dwelling house, barn, dairy house, water pipes, fencing, etc. William B. Ward died in October, 1890, soon after the passage of the forfeiture act. Mrs. Laborraque continued to reside on the land and her son, John, continued in the employ of the Ward family.

On June 21, 1892, Clarissa L. Ward, in behalf of the heirs of William B. Ward, applied to purchase the W. $\frac{1}{2}$ of Sec. 15, T. 14 S., R. 7 E., under the provisions of section three of the forfeiture act.

On July 27, 1892, Marie Laborraque made homestead entry for the NW. $\frac{1}{4}$ and one D. J. Mankins made homestead entry for the SW. $\frac{1}{4}$ of said section.

On July 27, 1893, a hearing was had to determine the rights of the respective parties. Mankins relinquished his entry, and on the proof submitted the heirs were allowed to purchase the southwest quarter.

Upon the evidence adduced the local office rendered decision finding that the plaintiffs had established their right to purchase the land in controversy and recommended the cancellation of Laborraque's entry.

An appeal was made to your office, and by letter of June 6, 1894, you concurred in the finding of the local office. Upon further appeal your office decision was affirmed by departmental decision of December 4, 1895.

The defendant, Mrs. Laborraque, claims that she went on this land with the understanding that in the event of its reverting to the government she would be at liberty to exercise the right of entry. Mrs. Ward, on the other hand, contends the agreement was that in case William B. Ward could not secure title either from the railroad company or the government, then Mrs. Laborraque could have the land.

In his motion for review counsel for defendant alleges that it was error to hold that Mrs. Ward was entitled to purchase in the name of the heirs of William B. Ward.

Ward was alive at the date of the passage of the act of September 29, 1890. If at the time of his death, he was in possession of this land and was entitled to purchase the same under section three of said act, then that right descended to his heirs. Such a right is a descendible and inheritable one. *Reith v. Miles* (19 L. D., 449.) However, the fact of whether or not Mrs. Ward is acting in the capacity of executrix or administratrix, in the absence of a showing to that effect, is a matter between the government and Mrs. Ward, and can in no way affect any rights which Mrs. Laborraque may have. Her rights must depend upon the showing she makes, regardless of the capacity in which Mrs. Ward is acting. The heirs are the only third parties who can properly object to the form of Mrs. Ward's application. It must be presumed that Mrs. Ward made her application in the interest of the heirs, and by your office decision title will enure to them.

Counsel also claims that it was error to find that Ward was in possession of the land under license from the railroad company. As previously shown William B. Ward came into possession of this land by purchase from Benjamin R. Devaul. Devaul had a possessory right by virtue of his acceptance of the circular invitation of the railroad company to settlers to go upon these lands. In *Eastman v. Wiseman* (18 L. D., 337) it was held that this is a transferable right. It cannot be denied that Devaul had such a right nor that he transferred it to William B. Ward. But defendant claims that the proof of such license is insufficient. Citing the case of *Eastman v. Wiseman*, *supra*, defendant argues that the circular issued by the railroad company inviting persons to settle on these lands should be put in evidence.

The records of this Department disclose the fact that such a circular as the one herein referred to was issued by the Southern Pacific Railroad Company. For this reason judicial notice may be taken of the same. In the recent case of *Gates et al. v. McElroy* (21 L. D., 515) the

applicant to purchase claimed to be in possession by virtue of the published invitation of the company. He also claimed to have received the acknowledgment by the company. But he had mislaid the circular and the letter of the company acknowledging receipt of his application. A certified copy, however, of his application to purchase from the railroad company, was introduced. It was held that said applicant established such a license from the company as is contemplated by the act of September 29, 1890. In the more recent case of *Moore v. Maguire* on re-review, (324 L. & R. 482) a copy of the circular issued by the Southern Pacific Railroad Company was put in evidence and is set forth in said decision. In view of these decisions, and others, it is seen that the Department has taken and may take judicial cognizance of such a circular.

By taking such judicial notice of the circular invitation of the company it must not be inferred that it is the intention of the Department to hold that said circular alone constitutes the applicant's license. To hold thus would be to break down the distinction between the two classes of persons enumerated in section three of the act of September 29, 1890, namely, 1st. Persons who "are in possession" of such lands, "under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees." 2d. Persons who "may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation." Such holding would place the persons of the second class on the same footing as those of the first, which was clearly not the intent of the act. But there must be something more. There must be an acceptance of the terms of the circular, by way of an application, on the part of the settler. "Without such application the company would have no means of knowing the exact tracts desired or claimed by each particular settler." *Moore v. Maguire, supra.*

The rulings of the Department in the case of *Eastman v. Wiseman, supra*, are undoubtedly correct. In that case it was held, *inter alia* (syllabus)—

The provisions of section 3, of the forfeiture act of September 29, 1890, according a preference right of entry to persons who are in possession of forfeited lands under "license" from a railroad company, extend to one who takes possession of, and improves such lands under the circular invitation of the company, and in accordance with said circular applies to purchase said lands of the company.

From the above it will be seen that there must be a mutuality or combination of acts in order to constitute a license. First, act on the part of the company in issuing their circular inviting settlers to take possession of and improve these lands on the conditions prescribed therein; second, act on the part of the settler in accepting the terms of said circular and applying to purchase said lands. One is not complete without the other. Neither the circular nor the application, alone, can be regarded as constituting the settler's license; but a combination of the two insures his right. And so soon as these acts on the part of the

company and the applicant are performed, the proof of such a license becomes a mere matter of evidence. This evidence may consist of the personal acknowledgment by the company of the settler's application, or evidence that his application is of record in the office of the company, or it may be derived by necessary implication from the circumstances surrounding the settler's compliance with the terms of the circular invitation.

In the case at bar the evidence that the application of licensee Devaul is of record in the office of the company, is not only proof that he made application but also proof that he had received the circular invitation of the company, and had gone into possession of the land in compliance with its terms. This constituted his license, whether he had ever gotten a reply from the company or not. His right being transferable it cannot but follow that the transferee Ward was in possession of the land in question under license from the railroad company.

The cases of James C. Daly, on review (18 L. D., 571), and Brown v. Anderson (21 L. D., 193), must not be construed as being in conflict with any ruling in the case of Eastman v. Wiseman, *supra*. It was not held in the latter case that the postal card which the settler received from the railroad company constituted his *license*, by implication or otherwise, but that it was evidence of the existence of a license to said settler. In the first cases, above mentioned a wrong interpretation was put upon the true ruling in the Eastman v. Wiseman case, in that particular.

As to whether or not William B. Ward was in actual possession of the land in question at the date of the forfeiture act, the evidence is very plain that Mrs. Laborraque was merely his tenant, and therefore cannot be regarded as a settler at the date of the passage of the forfeiture act. There is no evidence that, previous to that date, Ward had in any manner parted with his right of possession. To hold that he had, would be to hold that he *knew*, at the time he put Mrs. Laborraque on the land, he could not gain title either from the railroad company or the government. There was too much conjecture, prior to the passage of the forfeiture act, as to what action Congress would take in the matter of the disposal of these lands, to arrive at such a conclusion. It is entirely too remote to claim, whatever may have been the opinion in the community as to the final disposition of these lands by the government, that Ward had concluded that he could not secure title to them in any way, and that he would therefore surrender, for nothing, the possessory right he had purchased and the valuable improvements he had made. Hence, it must be concluded that Ward was in possession on the date of the passage of the act of September 29, 1890, and thus qualified to purchase under said act. It is a significant feature that Mrs. Laborraque did not make her homestead application until nearly two years after the passage of the forfeiture act.

Upon the above showing I see no reason for changing the departmental decision already rendered. The motion for review is therefore denied.

TIMBER AND STONE ACT—IMPROVEMENTS—ALIENATION.

KINGSTON v. ECKMAN.

The presence of improvements on a tract of land will not exclude it from disposal under the act of June 3, 1878, if said improvements are not made and maintained under a bona fide occupation of the land.

A contract or agreement that does not affect, in whole or in part, the title to the land is not within the inhibitory provisions of section 2 of said act.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (C. J. G.)

This controversy is in relation to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1 of Sec. 13 and lot 4 of Sec. 14, T. 66 N., R. 19 W., Duluth land district, Minnesota.

On June 15, 1893, the day on which the plat of survey embracing this land was filed in the local office, Henry Eckman filed timber and stone application to purchase said land, under the act of June 3, 1878 (20 Stat., 891), as amended by the act of August 4, 1892 (27 Stat., 348).

On the same day Lestina A. Kingston filed timber and stone application for the same land, which was at first held subject to Eckman's application, but later, on August 25, 1893 she was allowed to make her filing.

On September 16, 1893, Eckman gave notice of his intention to make final proof and payment for said land. Said notice issued and was duly published in a newspaper for ten consecutive weeks prior to the time set for submitting proof. December 18, 1893, was the date fixed for making said proof. Kingston was summoned to appear and show cause why Eckman should not be allowed to make final proof and payment for the land described, and her filing be canceled. She was also personally served with notice.

On December 18, 1893, Kingston appeared in person and by her attorney and filed protest against the acceptance of final proof by Eckman.

The allegations of Kingston's protest, as set forth in your office decision, are substantially as follows: That Eckman obtained his priority by physical force and intimidation; that his application did not properly describe the land, and that he was not identified at the land office, as required by law; that the affidavit was not such as required by law; that the affidavit by said Eckman of "no improvements of any bona fide settler" on the land, was substantially false and was a quibble and evasion of the law; that the proof of the citizenship of Eckman was not such as required by law, and that the same was irregularly filed; that Eckman was not at the date of filing a resident of Duluth land district, and was not entitled to the benefits of the timber and stone act in said district; that there were valuable improvements on the land belonging to the petitioner; that Eckman was a trespasser seeking to seize the valuable improvements of protestant, and that he

was taking said land on speculation and had entered into an agreement with other persons to give them an interest in said land or the timber thereon.

On December 19, 1893, the testimony in the case was taken, both the plaintiff and defendant being present in person and by their attorneys.

Upon examination of the case, after the testimony was submitted, the local officers rendered dissenting opinions; the register finding in favor of the defendant and the receiver in favor of the plaintiff. Both parties appealed from these decisions, and by office letter of October 20, 1894, you affirmed the finding of the register and dismissed plaintiff's protest. A further appeal by the plaintiff brings the case to this Department. The errors assigned, fifteen in number, in said appeal are practically the same as those on which the appeal to your office was based, and follow in the line of the allegations of protest filed previous to the hearing.

I deem it unnecessary to consider each error alleged in plaintiff's appeal. From an examination of the record I find the facts in the case are fully and fairly stated by the register and your office, and reference is hereby made to said decisions. I am of the opinion that the rulings of your office on each of the errors assigned are fully sustained by the evidence in the case. Reference, however, will be made to the following specifications, namely:

1. It was error to find that there was no testimony to show that appellee exercised either physical force or intimidation to obtain priority of application; that the application of the appellee was prior in point of time to that of appellant.

2. It was error to hold that at date of appellee's application there were no improvements as required by statute upon the land belonging to any *bona fide* settler, otherwise than those made by or belonging to the applicant; or that this fact, if established, entitled appellee to an entry.

3. It was error to hold, in substance, that the contract proven in the record (Exhibit "B") was objectionable in law; and that said contract could not properly be construed as requiring appellee to pay timber or land for legal services performed or to be performed, in violation of the statute.

There is no evidence to show that Eckman secured priority of filing by either physical force or intimidation. In view of the rushing and crowding on the morning of June 15, 18 93, it might have been dangerous for Mrs. Kingston to take a place in line. The evidence shows that four other women who were endeavoring to secure filings were accorded first places in the line. The allegation that Mrs. Kingston was prevented by physical force or intimidation on the part of Eckman from making a prior filing on this particular land is entirely too remote. There seems to be no question that Eckman's filing was prior in point of time. His application is No. 914; Kingston's is No. 1274. The blue pencil markings on the respective applications show that Eckman's was presented No. 33, while Kingston's was presented No. 60.

In determining priority of applications the statements of the local officers, contained in their report made in the ordinary course of business, are entitled to due weight and consideration. *McDonald et al. v. Hartman et al.* (19 L. D., 547).

Mrs. Kingston alleges that there were valuable improvements on the land in controversy belonging to her, and on that account Eckman's application was a plain evasion in terms of the letter and spirit of section 2 of the act of June 30, 1878, which requires the claimant to swear, at the time of filing, that the land applied for "contains no mining or other improvements save such as were made by or belong to the applicant." Eckman testifies that he inspected the land June 9, 1893, and saw no improvements. As the prior personal inspection of land required of an applicant under the act of June 3, 1878, does not necessarily require said applicant to pass over the land in question, it may be that Eckman did not notice the improvements which were alleged to exist on said land, *Grace v. Carpenter* (14 L. D., 431). The testimony shows that there were the remnants of a small shanty on the land, with neither floor, roof, door or window; there was no clearing or cutting of timber, except the timber cut to build the shanty, which at one time contained a roof and door. The evidence shows that the shanty had not been occupied for about four years. The preponderance of testimony is to the effect that the shanty was unfit for habitation, and it was the only improvement on the land.

Apart, however, from a consideration of this alleged improvement, its condition and value, it is not the improvement of a bona fide settler, as contemplated by section 1 of the act of June 3, 1878. Mrs. Kingston does not claim to have settled on this land. She only claims to be the owner of the improvements thereon.

In *Wright v. Larson* (7 L. D., 555), referring to the act of June 3, 1878, it was held that—

A settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a bona fide settlement within the meaning of said act.

In *McDonald v. Jaramilla* (10 L. D., 276), it was held that—

In the absence of an actual settlement, the ownership of improvements on public land does not confer any rights under the settlement laws, nor withdraw the land from entry by another.

In *Stone v. Cowles* (on review, 14 L. D., 90), it was held that—

A settlement right is not acquired by the purchase of the prior possessory right of another.

And in the case of *Miller v. McMillen* (id., 160), it was held that—

The presence of improvements on a tract of land will not exclude the same from disposition under the act of June 3, 1878, when said improvements were not made and maintained under a *bona fide* occupation of the land.

In *Hammel v. Salzman* (17 L. D., 496), referring to section 2 of the act of June 3, 1878, it was held that—

It would be a strained and unwarrantable interpretation to place upon the term "uninhabited," contained in this section, that such land should not be purchased, if perchance some one lived thereon, however lacking in good faith such settler might

be. If such construction were placed upon the act, it would follow that none of these lands could be entered under its evident intent, where any form of settlement existed, however fraudulent and illegal the residence might be.

By reference to the cases herein cited, it will be seen that Mrs. Kingston cannot be considered as a *bona fide* settler, and that the improvements claimed by her, regardless of their character and value, cannot operate to exclude these lands from purchase. It must also be concluded that the allegation in Eckman's affidavit as to there being no improvements of a *bona fide* settler on said lands was true, whether regarded from the standpoint of fact or of law.

In regard to the third and last specification of error to which I desire to refer, I have examined the contract alleged to be in conflict with section 2 of the act of June 3, 1878. The portion of section 2 which this contract is alleged to violate, requires that the timber and stone applicant shall make oath as follows—

and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part, to the benefit of any person except himself.

The only agreement or contract forbidden by the statute is one by which the *title* may inure in whole or in part to the benefit of any person except the applicant himself. If the agreement or contract is not of this character, it cannot be in violation of the statute. The statute itself makes a specific designation of the kind of agreement or contract that is forbidden. It will be observed from its language that the agreement or contract which may inure to the benefit of some other person than the applicant, must affect in whole or in part the *title* to the land. Under the statute of frauds such title can only pass to a stranger by some instrument in writing. Hence we must conclude that the terms of this agreement were not intended to go to the extent of affecting any title which Eckman might acquire from the government, and we must also conclude that these parties were to be paid for their services as set forth in the agreement, whether Eckman secured patent to this land or not. It must be held that if Eckman intended to make such a contract as that, any title which he might acquire should inure to the benefit of these parties, that fact can only be proved by a formal conveyance. The instrument under consideration cannot be regarded as such. It is permissible to read this instrument in the light of surrounding circumstances.

The duty of the court in such cases is to ascertain, not what the parties secretly intended as contradistinguished from what their words express, but what is the meaning of words they have used (Greenleaf on Evidence, Vol. 1, p. 323).

And as further proof that the agreement was of this character and was not intended to affect Eckman's title, evidence was introduced to show that the services of these parties were paid for in accordance with the estimate and agreement set forth in the instrument. The claim

was shown to be worth \$3,000 and the parties were paid \$400. The sum actually paid, as compared with the worth of the property, is too small to throw suspicion on the transaction. The contract shows that all the money was to be paid before the issuing of the patent, and it was so paid.

The evidence in this case further tends to show that Mrs. Kingston's application was made in the interest of and for the benefit of her husband, A. G. Kingston. It is shown that he purchased the shanty for her and paid the entry fees. Mrs. Kinston says that "Mr. Kingston gave me the money to purchase the land and the shanty."

Your office decision is hereby affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

ANDRUS ET AL. v. BALCH.

In the exercise of the right to perfect title under section 5, act of March 3, 1887, it is not material whether the purchase from the company was made before or after the passage of said act, if made in good faith believing the title to be good, and before the land purchased was held to be excepted from the grant.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 21, 1896. (F. W. C.)

I have considered the appeal filed on behalf of A. P. Andrus *et al.*, from your office decision of March 21, 1893, wherein you rejected certain homestead applications for conflict with the application of Henry F. Balch to purchase, under the provisions of section 5, of the act of March 3, 1887 (24 Stat., 556), the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of Sec. 17, T. 47 N., R. 4 W., Ashland land district, Wisconsin.

Said section is within the overlapping ten-mile limits under the grants made by the act of May 5, 1864 (13 Stat., 66), to aid in the construction of the road now known as the Chicago, St. Paul, Minneapolis and Omaha (Bayfield branch), and the Wisconsin Central Railroad.

The land was also within the fifteen mile or indemnity limits under the grant made by the act of June 3, 1856, to aid in the construction of the first mentioned road. The company's map of definite location of the Bayfield branch was filed July 17, 1858, which being prior to the passage of the act of 1864, which enlarged the grant from six to ten sections per mile, the right within the additional four miles is held to have attached upon the passage of said act of May 5, 1864. The map showing the line of definite location of the Wisconsin Central was filed in November, 1869. Your office decision states that the records of your office show that on July 2, 1858, Wm. Soffing filed unoffered declaratory statement No. 506, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 17, alleging settlement June 29, 1858, and that July 12, 1858, John Sheley filed unoffered declaratory statement No. 513, for the

SW. $\frac{1}{4}$ of said section, alleging settlement May 6, 1858. It would appear that said filings were still of record, uncanceled.

Under the acts of July 14, 1870, and March 3, 1871, said filings being for unoffered lands did not expire until July 14, 1872, which was subsequently to the dates of the attachment of rights under the grants for said companies, under the act of May 5, 1864.

It would appear, therefore, that the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of said section, were excepted from the operation of the grants for both of said companies.

Your office decision further held, however, that the remainder of the tracts covered by Balch's application, namely, the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, of said Sec. 17, were also excepted from the grant to the Central Company under the previous rulings of this Department which held that the reservation for indemnity purposes, under the act of 1856, was sufficient to defeat the grant for the Wisconsin Railroad Company. Such holding is held to have been error by the Supreme Court of the United States in its decision of June 3, 1895, in the case of Wisconsin Central Railway Company *v.* Wm. O. Forsyth (159 U. S., 46).

Within the common ten-mile limits the Omaha and Wisconsin Central Railroad companies entered into an agreement to partition the lands and under this agreement the lands in this township, namely, 47 N., R. 4 W., were awarded the Central Company. In 1884 the State duly patented the lands herein involved to the Omaha Railway Company, and, in accordance with the agreement entered into between the companies, the Omaha Railway Company on April 15, 1884, conveyed these tracts to Henry F. Spencer, who in turn conveyed the land herein applied for to Balch on April 2, 1887.

Under the former rulings, these lands being supposed to be a part of that appertaining to the Omaha grant, not being needed in its satisfaction, were ordered restored and it was under the notice given of such restoration that Balch applied to purchase the lands under the fifth section of the act of March 3, 1887, and submitted his proof showing his qualifications on April 11, 1891. Balch's proof, it appears, was made without giving notice, by publication, of his intention to offer the same, but on the day the proof was made protests were filed on behalf of A. P. Andrus *et al.*, covering the lands applied for by Balch. Hearing has since been held and the showing made evidences that none of the protestants have any such right; in themselves, as would prevent Balch from purchasing under the act of 1887.

The land applied for is opposite the constructed portion of the Wisconsin Central Railroad, and as these lands were, in partition between the two companies, awarded to the Central Company, and as the records fail to show any claim sufficient to defeat the grant of the Central Company to the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section 17, the same would appear to have inured to the company under its grant, and for that reason the application by Balch, and any conflicting homestead applications covering said tract, are rejected.

It but remains to determine whether Balch is entitled to purchase under the act of March 3, 1887, *supra*, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of said section 17, covered by his application and shown to have been excepted from the grant made to aid in the construction of the Wisconsin Central Railroad.

The local officers held that he was not entitled to make such purchase as he had purchased of the Central Company, after the passage of the act of March 3, 1887.

Your office decision found that, as there had been a sale made by the Omaha Company to Spencer prior to March 3, 1887, Balch was protected through said purchase.

The history of the transaction between the Omaha Company and Spencer shows that the transfer made was not a sale by the Omaha Company, but a transfer for the benefit of the Central Company in accordance with the previous agreement entered into between the companies.

Balch purchased through the Central Company after the passage of the act of March 3, 1887, and the question therefore arises: does this fact bar the right of purchase?

The sale seems to have been made in good faith believing the title to be good and for a valuable consideration.

In the case of *Sethman v. Clise* (17 L. D., 307), it was shown that certain lands excepted from the Union Pacific R. R. grant, were, by that company, sold on March 15, 1884, to Genordo Lasasso and Sabbato Sungaria. These parties transferred their contract of purchase to Peter H. Sethman on April 19, 1887, and after the lands were held to have been excepted from the grant, Sethman applied to purchase under the provisions of section 5, of the act of March 3, 1887.

The question was raised as to whether the original purchasers from the company were qualified parties, and upon the record made this Department held as follows:

As seen heretofore, their qualifications are not important if the purchasers from them are qualified. There is no abstract with the record showing the transfers of the tract, or the assignments of the contract of purchase.

It is asserted by counsel for Sethman in their brief, that "After several assignments of the original contract with the railroad company, it was, on April 19, 1887, by its then owners, assigned to Peter H. Sethman, who fully paid for the land and completed the contract, and the company, by deed dated April 19, 1888, and acknowledged August 27, 1888, finally conveyed the tract to him." The question arises as to whether Sethman, having purchased the tract after the passage of the act of March 3, 1887, will be allowed by the terms of the fifth section thereof to purchase the land from the government? Said act directs the immediate adjustment of railroad grants, and the fifth section, it seems, was intended to afford a means by which certain purchasers from the roads, who should, by reason of said purchases, have acquired equities in the lands claimed by them, have the privilege of saving their interests by giving them preferred rights to purchase said tracts from the government, and to save their interests more completely from loss it was provided by the fourth section of the act that they might recover from the railroad companies the purchase

price thereof. The prime object of the act was to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and to recover lands erroneously patented to said companies. Congress contemplated the immediate adjustment of these grants, and while willing to afford means for recovering from said companies lands to which they were not actually entitled, or lands not earned by them, but claimed by them under their respective grants, it was unwilling to destroy the equities of said companies' grantees, or those whose title was held through them; hence the fifth section sought to protect such transferees.

Attorney General Garland gave an opinion on certain questions proposed to him on the third, fourth and fifth sections of this act on November 17, 1887 (6 L. D., 272), speaking of the act, on page 275 he says: "The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their right or acquired equities, which in justice should be recognized. . . . The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claims."

In my opinion it was the intention of Congress that the adjustment of these grants, should be begun at once and completed as soon as possible, yet experience has shown that making these adjustments was not the work of a day and Congress must be held to have known that much time was necessarily employed before the end should be reached.

The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when in the adjustment of these grants it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if *bona fide*, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of the approval of the act; if it was originally purchased in good faith from any said company.

The argument here used applies with equal force where the original purchase was made after the passage of the act, as where the transfer from the original purchaser was made after the passage of the act and I am of the opinion that it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good and before the land purchased was held to be excepted from the grant.

Balch's proof will therefore be accepted as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 17, and the conflicting homestead application will stand rejected.

To this extent your office decision is affirmed.

CONTEST AFFIDAVIT—PRIORITY OF APPLICATION.

KELSO *v.* JANEWAY ET AL.

Dates in contest papers should not be changed by an attorney after the execution of such papers and prior to the filing thereof, though such action will not be held to invalidate affidavits so changed.

As between two applications to contest an entry, one received by mail in due course, and lying unopened on the register's desk at nine o'clock in the morning, and one presented in person at such hour, priority should be accorded the latter.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 21, 1896. (I. D.)

N. J. Anstine, intervenor in the case of James E. Kelso *v.* Wm. Janeway, defendant, appeals from your office decision of June 21, 1893, involving the SW. $\frac{1}{4}$ of Sec. 9, T. 11 N., R. 8 W., Oklahoma land district, Oklahoma.

The question in this case is as to the priority between Kelso and Anstine as contestants of Janeway's entry.

The facts, fully stated, are as follows:

On the 26th of October, 1892, Kelso appeared at Oklahoma City for the purpose of initiating contest against Janeway's entry, on the ground of abandonment for more than six months, when he learned from an examination of the records in the local office that Janeway's entry, having been made on April 25, 1892, contest could not be initiated until the 27th of October, the day following.

Kelso's business required his presence on the next day at Reno, whereupon, under the advice of his attorney, proper affidavits of contest and corroboration were prepared and sworn to on the afternoon of the 26th (Kelso having brought his corroborating witnesses with him), whereupon he left Oklahoma City that evening with instructions to his attorney to file the contest affidavit on the morning of the 27th.

It appears that by inadvertence of the notary who took said affidavits, he dated the affidavit of Kelso, himself, the 26th—which was the true date—and the affidavit of the corroborating witnesses the 28th, although both were taken at the same time.

Kelso's attorney discovered this discrepancy in the dates on the morning of the 27th, and at his own instance erased both dates and made them appear to have been taken on the 27th. He waited in line from eight o'clock on the morning of the 27th until the office opened at nine o'clock, when he entered and filed the same.

The action of the attorney in this case in changing the dates of the affidavits, after their execution, is reprehensible, and while it will not be held by the Department as invalidating the instruments in which the changes were made, should be discountenanced, and if it amounts to a practice should be promptly discontinued.

Anstine, with his corroborating witnesses, was present in the city on October 27, 1892, and about 8:30 A. M. executed proper affidavits of

contest, but instead of going to the office and filing the same, he went to the post-office and mailed them to the register and receiver.

It appears that the mail was taken from the post-office to the local office a few minutes before nine o'clock and Anstine's affidavits were lying with other mail upon the desk, unopened, at the time Kelso's attorney presented his affidavits of filing.

The only question made is that Anstine having used the mails was enabled to get his application upon the desk of the local officers at an earlier hour than any other applicant could obtain entry.

The local officers say that there was no occasion for this method of reaching them, inasmuch as business was slack at the time and no rush prevented people from being admitted without delay. The local officers found, and your office decision adopts that view, that Anstine attempted to take undue advantage by this mode of filing his contest affidavit.

The agreed statement of facts does not say whether Anstine knew of Kelso's intention to contest the land or not, and really this cannot make any difference.

The sole question is: Can the mail be used for the purpose of getting an application for an entry or a contest upon the desk of the local officers so as to obtain precedence over other applicants who waited at the door for the opening of the office at nine o'clock?

In John W. Nicholson (9 L. D., 54), the affidavits of contest of both Nicholson and Wren were prepared in the same building with the land office, Nicholson standing at the door waiting for the opening at 9 o'clock, while Wren took his to the post-office and put a special-delivery stamp upon it, so it was taken into the land office and was placed of record before business hours.

The Honorable Secretary held in that case:

That while the local officers are not expected or required to transact business out of office hours, yet there is no law of the United States prohibiting them from doing such business, and in case they do, their acts are valid.

On January 1, 1889, a general circular was issued by your office prescribing the duties of registers and receivers, on page seventy-four as follows:

They will be in attendance regularly at their office, keeping the same open for the transaction of business from nine o'clock a. m. until four o'clock p. m. . . . Applications to make entry can not be received by the register or receiver out of office hours nor elsewhere than at their office.

The decision in the Nicholson case was made July 3, 1889, but the filing of affidavits of contest by Wren and Nicholson was made long before the circular of January 1, 1889. Under that circular the fact that an affidavit was received by mail after four p. m. and before nine a. m., of the next business day, can give no priority. No action can be taken upon it before nine o'clock a. m.

What advantage should such an application have over applicants who were standing at the door waiting for the opening of business

hours? In the absence of any regulation by your office, it would seem equitable that the rule should be the same as in cases where two men entered at once. Whatever case is first taken and acted upon in fact should be prior. Where applications received by mail are lying on the desk of the local officers on the opening of the office for business, if in the ordinary course of business the mail is in fact opened and the application thus in business hours *becomes presented* to the officers, it will have priority, but if in like manner an applicant presents his contest at once, at nine o'clock, or before the mail is opened, then such application should have priority.

In the case at bar the contest was prosecuted to a cancellation by Kelso, whose application was in fact first presented to the local officers, although the unopened mail on the desk at nine o'clock contained Anstine's affidavit.

In the absence of an order requiring mail to be first opened and applications therein to be filed, the ordinary way any business man would act would seem to be the true method, and if a business man found at the opening of business hours a pile of letters on his desk and several men waiting to see him, he would naturally first wait on applicants present in person before opening and disposing of his mail. If he should open the mail after nine o'clock and before another application is presented, the mailed application has priority.

I find no rule requiring mail to be first opened, and no decision that gives priority to an unopened application over one actually first presented to the officers at nine o'clock.

Your office decision is affirmed.

MINING CLAIM—UNSURVEYED LAND—NOTICE.

BROAD AX LODE.

A location on unsurveyed land, connected by course and distance with a mineral monument, requires, on application for patent, such connection to be shown in the published notice.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1896. (P. J. C.)

The record before me shows that F. M. McGregory *et al.* made application for patent March 12, 1881, for the Broad Ax lode mining claim, lot No. 1498, Leadville (now Gunnison), Colorado, land district. Adverse proceedings were instituted in behalf of the Eureka and Buffalo lode claims. Entry was made August 1, 1883, excluding the area in conflict with the adverse claims. Subsequently certain supplemental evidence was called for by your office, together with an amended survey showing the conflict.

By letter of November 23, 1894, your office required claimants "to publish a supplemental notice of their application for patent for the statutory period," for the reason that in the published notice the con-

nection of corner No. 1 of the claim to United States location monument "Elk Mountain" was not given. Claimant was also required to furnish evidence, "that the statutory expenditure of \$500 in labor or improvements has been made upon the claimed ground."

Subsequently, by letter of January 19, 1895, your office overruled claimants' application to refer the entry to the board of equitable adjudication, whereupon claimants appealed from your office decision of November 23, 1894, assigning as error your office action in requiring additional publication.

The land upon which the Broad Ax is located was unsurveyed. A locating monument, however, had been placed in the vicinity, and corner No. 1 of the claim was tied to this monument by course and distance. In the publication notice this connection was entirely omitted, hence as the notice read the locus of the claim would not have been definitely fixed. This is clearly not in compliance with the rules which require mining claims to be located with reference to some natural object or permanent monument that will identify the same.

Your office judgment is therefore affirmed.

SOLDIER'S HOMESTEAD—CONTEST—SETTLEMENT—APPEAL.

GEORGE v. STROUD.

A contest will lie against a soldier's homestead entry on a charge of failure to settle on the land and improve the same within six months from date of filing the declaratory statement.

An allegation that an entry is made in bad faith and for the purpose of speculation, and not for the purpose of actual settlement and cultivation warrants investigation as to the matter so charged.

Ex parte affidavits should not be filed with an appeal, and if so filed will be returned to the party filing the same.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 21, 1896. (C. W. P.)

I have considered the appeal of Thomas J. George from the decision of your office of September 12, 1894, dismissing his contest against soldier's homestead entry, No. 5747, made March 14, 1894, by Ephraim J. Stroud, on the SE. $\frac{1}{4}$ of section 9, T. 22 N., R. 1 W., Perry land district, Oklahoma Territory.

It appears from the record that George initiated a contest against said entry on April 11, 1894, alleging that the said Ephraim J. Stroud did not commence his settlement and improvements and establish his residence and fulfill all the requirements of the homestead law within six months from the date of his declaratory statement, No. 45, that the said entryman, Ephraim J. Stroud, went upon said land for the purpose of speculation and has repeatedly tried to sell the same; that he did not take said land for a home for himself; and that said entry was not made honestly and in good faith for the purpose of actual settlement and cultivation.

Notice was issued and served by publication of a hearing to be had at the local office on June 19, 1894; the parties appeared, and the defendant filed a motion to dismiss the contest on the ground that the charges in the complaint were too vague and indefinite to constitute a cause of action. This motion was sustained, and the plaintiff appealed. Your office affirmed the judgment of the register and receiver, and dismissed the contest.

In this decision I cannot concur.

Section 2304, Revised Statutes, provides that a soldier homestead settler "shall be allowed six months after locating his homestead and filing his declaratory statement, within which to make his entry and commence his settlement and improvement;" and section 2309, after providing for the initiation of the claim by filing a declaratory statement, proceeds to declare, "but such claimant, in person, shall within the time prescribed make his actual entry, commence settlement and improvements on the same, and thereafter fulfill all the requirements of law." In the case of a soldier homesteader the law requires settlement, improvement and entry as conditions precedent, without which no right to the land is acquired.

"Thereafter," says the statute, "the soldier must fulfill all the requirements of the law"—the conditions subsequent—as in other cases; therefore—i. e., prior to acquiring a right to the tract—he must settle and improve as well as enter. A failure in either requirement, therefore, vitiates the entry as entirely as does the want of any other qualification or essential act. *Charles Hotaling* (3 L.D., 17).

Clearly the charge in this affidavit is a sufficient allegation that Stroud had not performed the conditions precedent of settlement and improvement without which no right to the land was acquired. If he has cured the delinquency, it is for him to show it in defence. (*Smith v. Johnson*, 9 L.D., 255.)

The charge that Stroud went upon said land for the purpose of speculation, and has repeatedly tried to sell the same; that he did not take said land for a home for himself; that said entry was not honestly and not in good faith made for the purpose of actual settlement and cultivation,

is, I think, a sufficient allegation that Stroud made his entry in bad faith, and for the purpose of speculation, and not for the purpose of actual settlement and cultivation. *Sims v. Busse* (4 L.D., 369); *Gilbert E Read* (5 L.D., 313).

Stroud has filed a motion to dismiss George's appeal because "the one specification of error assigned, viz, 'It (the Honorable Commissioner's decision) is contrary to law', is too vague, indefinite, and not sufficient."

He is mistaken. The specification of errors sets forth the respects in which George deems your office decision to be wrong. The motion is denied. There is also a motion to strike from the files the *ex parte* affidavits attached by George to his appeal.

These *ex parte* affidavits were improperly filed with the appeal, and

you are directed to return them to the local officers to be delivered to George or his attorney. This motion is granted.

The decision appealed from is reversed, and your office will direct that the contest of Thomas G. George be allowed.

TOWNSITE ENTRY—FINAL PROOF—SUBSTITUTED WITNESS.

TOWNSITE OF O'KEENE.

In the submission of final townsite proof the testimony of a substituted witness cannot be accepted without further advertisement, unless two of the advertised witnesses testify.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 21, 1896. (F. W. C.)

On April 4, 1895, your office rendered a decision in this case, by which you required the probate judge of Blaine county, Oklahoma Territory, to submit the testimony of two of the advertised witnesses who will testify that they are disinterested, or to make new proof after due advertisement.

The probate judge appealed to the Department.

The record shows that on July 1, 1893, Leander Martin, probate judge of Blaine county, Oklahoma Territory, made application before the local officers at Kingfisher, Oklahoma Territory, to enter the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 19, T. 19 N., R. 10 W., I. M., and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 19 N., R. 11 W., I. M., under sections 2387 and 2388 of the Revised Statutes of the United States, section 22 of the act of Congress of May 2, 1890 (26 Stat., 81), and section 17 of the act of Congress of March 3, 1891 (26 Stat., 1026), as a townsite for the use and benefit of the occupants thereof.

On August 10, 1893, after due advertisement and posting of notice of his intention so to do, said probate judge appeared before the local officers with his witnesses and submitted his final proof.

On October 19, 1893, the receiver issued his receipt for \$115.02, paid by said probate judge for said land at \$1.50 per acre. On the same day the register issued his final certificate, No. 974, for said land to said probate judge.

By your letter of September 26, 1894, the final proof was returned to the local officers with direction to require said probate judge to furnish the proper proof in support of his own testimony, without advertisement, which proof should consist of the testimony of the witnesses to the final proof submitted, or of other advertised witnesses. On March 18, 1895, the local officers transmitted the testimony of August Brockman, one of the advertised witnesses, and of Patrick S. Nagle, a substituted witness. Neither of said witnesses testified that he is not interested in the land involved. Nagle testified that two of the advertised witnesses have left O'Keene, and are somewhere in the "Cherokee

Outlet," and that one of the advertised witnesses refused to appear and give his testimony in the case, and that the testimony of the two witnesses alleged to be in the "Cherokee Outlet" can not be readily obtained without great expense and delay. Your office held that the proof of the substituted witness could not be accepted, nor could the testimony of the witness Brockman be accepted, as he did not testify that he is disinterested.

Departmental circular approved July 17, 1889 (9 L. D., 123), containing rules to be observed in passing upon final proofs, where the same are required by the general land laws or regulations of this Department, provides (paragraph 4):

When a witness not named in the advertisement is substituted for an advertised witness, unless two of the advertised witnesses testify, require new advertisement of the names of the witnesses who do testify at such time and place as you may direct; and if no protest or objection is then filed, the proof theretofore submitted, if satisfactory in all other respects, may be accepted.

It is plain under this regulation that the proof of a substituted witness can not be accepted unless two of the advertised witnesses testify, without further advertisement, and this rule seems to apply to townsite proof as well as proof tendered under other laws or regulations.

Your office decision requiring the submission of proof by advertised witnesses or new publication before accepting that of a substituted witness, is affirmed.

The witnesses should also be questioned as to whether they are in any wise interested in the entry proposed to be made, and if so the nature of their interest should be disclosed.

CONTEST—COSTS—RESIDENCE—TERRITORIAL STATUTE.

THOMPSON *v.* SMITH.

Under a contest against a homestead entry in which the contestant asserts no right to the land, but charges non-compliance with law, and offers to pay the costs of the proceedings, the costs should be assessed under rule 54 of practice, and on the refusal of the contestant to pay the same the contest may properly be dismissed. In determining whether the residence maintained by a homesteader, who holds the office of postmaster, is in compliance with law, the Department will not hold that a tract of land, sufficiently near the post-office to allow the postmaster to reside thereon and attend to his official duties, is not within the delivery of said office as contemplated by the statute.

The designation by the entryman, under a territorial statute, of lands claimed as a "homestead," other and different from those embraced in his entry, does not raise any presumption of abandonment that requires explanation on the part of the entryman, where said territorial law permits a person to designate land on which he does not reside as a "homestead."

Acting Secretary Reynolds to the Commissioner of the General Land Office,
February 25, 1896. (J. McP.)

Sidney J. Thompson has appealed from your decision, "H" of July 31, 1894, dismissing his contest against H. E. No. 1405, made January

23, 1893, for the S. W.⁴ of Sec. 35, T. 6 S. R. 6 E., Tucson, Arizona, land district.

The contest affidavit was filed by Thompson, on December 18, 1893, and personal service was obtained January 2, 1894, and (material parts quoted) is as follows:

Sidney J. Thompson on his oath says, that William C. Smith never made a residence on said tract, and has wholly abandoned said tract, and changed his residence therefrom for more than six months since making said entry and next prior to the date herein and this the said contestant is ready to prove at such time and place as may be named by the register and receiver for a hearing in said case; that he therefore asks to be allowed to prove said allegations and that said homestead entry No. 1905, may be declared canceled and forfeited to the United States—he the said contestant paying the expenses of such hearing.

Both parties litigant appeared with their attorneys at the trial. After several witnesses had been called and examined by the plaintiff, the defendant William C. Smith, was adduced as a witness in plaintiff's behalf. He was subjected to a long and searching examination by the contestant, and was freely cross-examined by his own counsel.

After the conclusion of plaintiff's case, Smith the defendant took the stand in his own behalf, and after answering a few preliminary questions, a deposit for costs was demanded of the contestant by the local officers. To this demand the contestant objected stating that he has paid, or is willing to pay for any testimony taken in his behalf; that he believes he has proven the charges laid in his contest affidavit, for which he applied for a hearing; that he believes that the register and receiver are in error in demanding of him a deposit to pay for the testimony of the contestee, under rule of practice 54, inasmuch as he, the contestant, has not claimed preference right of entry under the act of May 14, 1880.

The defendant asked that at his own expense, he be allowed to examine certain witnesses in order that their testimony might be incorporated in the record, so that in case the action of the local officers, in reference to the taxation of costs, should be reversed on appeal, said testimony might be considered in his behalf, thus obviating the necessity of a new trial. The defendant reserved the right to move for a dismissal of the case, at any time he saw proper.

The defendant testified in his own behalf, and after he had been cross-examined at some length by the plaintiff, he refused to pay for further testimony and moved that the case be dismissed for the reason that the contestant refused to pay the costs of reducing the testimony to writing.

The local officers ruled that, inasmuch as the contestant had proposed to pay the costs of the hearing, in his contest affidavit, that the contest would be dismissed unless within a given time a sufficient deposit for costs was made by the plaintiff. The contestant refused to make the required deposit and the case was dismissed.

Your office, on the appeal of the plaintiff, sustained the action of the

local office in dismissing the contest, and on the merits of the case held, that the testimony would not warrant the cancellation of the defendant's entry in the interest of the government.

The contest of Thompson was properly dismissed by the local officers, on his refusal to pay for reducing the defendant's testimony to writing. Thompson asserted no present right to the land, his contest being based on the charge that the defendant had not complied with the homestead law. He asked for a hearing in order that he might establish these charges, and proposed to pay the expenses of the hearing. The costs were assessed by the local officers under rule 54, of the Rules of Practice, and the contestant when he had rested his case was asked to make a deposit to cover the expense of transcribing the defendant's testimony. He refused the request of the local officers, maintaining that inasmuch as he had not claimed a preference right of entry, under the act of May 14, 1880, the cost of transcribing the testimony for the defense should be borne by the entryman. He was then notified by the local officers that unless a deposit to cover the further cost of the hearing was made by him within a given time, his contest would be dismissed, and the contest was dismissed upon his refusal to make the deposit.

The costs were correctly assessed under rule of practice 54, the contestant having asserted no right to the land, and, when the contestant refused to pay the expenses of the trial, he was properly eliminated from the case by a dismissal of his contest.

It is urged by the appellant that William C. Smith, the entryman while on the stand as a witness for the plaintiff, incumbered the record with immaterial, irrelevant, and irresponsive testimony for transcribing which the appellant was unjustly compelled to pay, and that

if Smith the contestee had answered the questions of the contestant responsively the deposit of the contestant for transcribing the testimony would it is believed have been sufficient for taking all the testimony in the case.

There is too much left to speculation in this contention. It is manifest that this Department cannot say that the money deposited by the contestant, was sufficient to pay all the costs of the hearing, since the entire deposit was exhausted by the contestant in the examination of his witnesses, even though it be admitted that the contestant was wrongfully compelled to pay for *some* testimony, as it is impossible to say that the money expended in reducing such testimony to writing would have been sufficient to pay all the legitimate expenses of transcribing the defendant's testimony.

Furthermore the appellant does not specify the testimony that he regards as immaterial and irresponsive, and this Department, in the absence of such specification, will not attempt to determine, whether or not there is incorporated in the record irrelevant testimony for transcribing which the appellant was unjustly required to pay.

It was shown that at the time Smith made entry of the land he held

the position of postmaster at Casa Grande, Arizona, and that he occupied that position at the date of hearing before the local officers.

The appellant strenuously contends that you erred in finding that the land in controversy is within the delivery of the Casa Grande postoffice.

The towns of Arizola and Casa Grande, are situated some three miles apart and there is a postoffice at each of these places. The land in controversy lies decidedly nearer Arizola than Casa Grande. It appears, however, that a number of parties who reside nearer Arizola than Casa Grande, receive their mail at the last named place, and that the distance from Casa Grande to Smith's homestead is less than four miles. Furthermore it is not denied, that from the latter part of December, 1893, to the date of hearing before the local officers, in February, 1894, the entryman resided on his homestead and attended to his duties as postmaster. I do not think that the land department is warranted in holding that a tract of land situated sufficiently near the postoffice to allow the postmaster to reside thereon, and attend to his duties as postmaster, is without the delivery of the office within the meaning of the statute.

It also appears that on October 27, 1893, William C. Smith filed in the office of the Recorder, in and for Pinal County, Arizona a "Declaration of Homestead", wherein it is represented by the said Smith that he is the head of a family and that he claims certain described parcels of land as his homestead. This declaration it seems was filed in pursuance of sections 2071-2085, of the Revised Statutes of the Territory of Arizona, which provides, that any person who is the head of a family may hold as a homestead exempt from execution and forced sale real estate to be selected by him, not to exceed in value the sum of four thousand dollars, and that any one desiring to avail himself of the said provision shall make out in writing his claim and file the same with the recorder of the county in which the land so designated is situated.

The appellant submits that the execution of this homestead declaration under the laws of the Territory of Arizona, wherein other and different land from that embraced in the homestead entry of Smith is designated, is an abandonment of the homestead entry, and he insists that at least such a presumption of abandonment of the homestead entry is cast by the filing of said homestead declaration that the entryman should be compelled to show at his own expense that he had not in fact abandoned his homestead entry.

I do not think that because the entryman, who it appears was unfortunate in business affairs, availed himself of an exemption authorized by the law of Arizona, forfeited his right to acquire title to the land that he entered as a homestead under the laws of the United States. It is true that the specified land was "claimed as a homestead" by Smith but it is asserted by the entryman in his brief, filed before your office, that under the law of Arizona, a person may designate land as a

homestead on which he does not reside and this proposition seems to be supported by section 2085 of the Revised Statutes of Arizona, which provides that "land other than that upon which the claimant resides may be held as a homestead."

If then the laws of Arizona, under which this homestead declaration was filed does not require the claimant under such declaration to reside on the lands enumerated therein, it is difficult to perceive how any presumption would be cast, by the execution thereof, which would require the entryman in this case to enter into any explanation as to his place of residence. The point is not well taken.

You find:

That defendant has improvements on the land worth about \$500 consisting of clearing, house, well, and barn; that defendant lived in the house about ten days in the latter part of June, 1893, when on account of sickness he sent his wife and child to California; . . . that from July to December 27, 1893, the defendant was absent nearly all the time; . . . that on December 27, 1893, he returned to the land with his family and was residing thereon, when notice of contest was served January 2, 1894, and it is not shown that such return was induced by knowledge of contest.

Your finding of facts is sustained by the record, and your conclusion that plaintiff has failed to make such a showing as would justify the government in canceling Smith's entry is approved.

MINING CLAIM—EXPENDITURE—CERTIFICATE OF SURVEYOR GENERAL.

WHITE CLOUD COPPER MINING COMPANY.

The work done on different portions of a road constructed for the development of several mining claims, can not be apportioned as an expenditure upon the different claims, and applied to a claim on which no portion of such road is located. An applicant for mineral patent must at the time of application, or within the period of publication, file a certificate of the surveyor general showing an expenditure of five hundred dollars on the claim, and, if the certificate, so filed, does not show such expenditure, additional time to make further improvements can not be granted, but the entry allowed on such proof must be canceled.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
February 25, 1896. (J. A.)

I have considered the appeal of the White Cloud Copper Mining Company from the decision of your office of August 29, 1894, holding for cancellation its mineral entry No. 460, made December 30, 1893, for the Copper Ingot lode claim, lot No. 46, Carson City land district, Nevada.

Your office on May 7, 1894, advised the local officers as follows:

The report of the surveyor general shows mining improvements upon the Copper Ingot claim to the value of \$300.00.

Five hundred and twenty-five feet of a road one mile in length, no part of which is upon the claim is also reported as having been built for the benefit of the claim

and is valued at \$700.00. A road is not necessarily a mining improvement. The construction of a portion of a road not upon the claim cannot be accepted as a compliance with the law relative to expenditure upon mining claims.

You will allow claimant sixty days within which to show cause why said entry should not be held for cancellation.

The claimant requested that time be granted within which to expend two hundred dollars more in improvements on the claim, and that such improvements be considered as having been made at the proper time.

Your office, in the decision appealed from, held that an applicant for a patent under section 2325, Revised Statutes, must, at the time of application, or within the period of publication, file a certificate of the surveyor-general showing an expenditure of five hundred dollars in improvements on the claim. The request to be allowed to make additional improvements was therefore denied, and the entry was held for cancellation.

The appellant contends: 1st. That this case is similar to that of the Emily Lode (6 L. D., 220), and that patent should issue on the improvements shown.

2. That, on the holding that the improvements are insufficient, he should have been granted time to make additional improvements.

In the case of the Emily Lode a trail and road were built to carry ore from the mine to the company's smelter. No part of the trail or road was included in the improvements credited to any of the other claims of the company. It was held that the trail and road may be considered as a part of the five hundred dollars' worth of improvements required to be on the claim, although only a small part of the trail was within the surface boundary thereof.

In the case at bar five hundred and twenty feet of a road a mile long are sought to be credited as an improvement to the claim. Other five hundred and twenty feet of the same road are certified to as the improvements to be applied to another claim.

The work done on different portions of the company's road cannot in this manner be credited to its different claims. Your office correctly held that the claimant is not entitled to a patent on the improvements shown.

December 4, 1895, this Department rendered decision herein, holding that the entry should have been suspended and the entryman allowed within a reasonable time, fixed by your office, to make two hundred dollars' worth of additional improvements and to submit proof thereof without republication. My attention having been called to the fact that it is the uniform practice to cancel entries in all cases in which the necessary improvements have not been made within the required time, the said decision is hereby recalled and revoked. The claimant's request that further time be granted to make improvements was properly denied and the entry held for cancellation. The decision appealed from is, therefore, affirmed.

RAILROAD GRANT—EXCEPTED LANDS—PRE-EMPTION FILING.

OREGON AND CALIFORNIA R. R. CO. *v.* EIDSON.

Under the terms of the grant of July 25, 1866, wherein lands "pre-empted" are excepted therefrom, a tract covered by a valid subsisting pre-emption filing at date of definite location is taken out of the operation of said grant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
February 29, 1896. (E. B.)

The Oregon and California Railroad Company appeals from the decision of December 4, 1894, by your office wherein it was held that the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, T. 38 S. R., 4 W., Oregon, was excepted from the grant of public lands to the company by the act of July 25, 1866 (14 Stat., 239), on the ground that at the date of definite location of its road the track in question was covered by a pre-emption declaratory statement.

Several grounds of error are set out in the appeal but it is only necessary to consider the first of them, viz: That the said declaratory statement did not bring the land within any of the exceptions found in the said grant.

The record shows that one John Shoemaker filed his declaratory statement for said tract April 23, 1883, alleging settlement March 20, 1883, that said company filed its map of definite location, as to the land in question, July 3, 1883, and that one Thomas J. Eidson entered the said tract as a homestead August 10, 1893. The second section of the said act grants the alternate odd numbered sections of public land, not mineral, within ten miles on each side of its railroad line, to said company, reserving, among others, lands "found to have been pre-empted", and directs that upon the filing in the office of the Secretary of the Interior, by said company, its map of definite location, the Secretary of the Interior shall withdraw from sale the lands thus granted.

It is well settled that the right of a railroad company to public lands under such grant attaches when the line of its road is definitely located; also that the status of the land at date of such location determines whether it is subject to the grant (*Carrahar v. Iowa Falls and Sioux City R. R. Co.*, 2 L. D., 483; *Showell v. Central Pacific R. R. Co.*, 10 Id., 167, and *Kansas Pacific Railway v. Dunmeyer*, 113 U. S., 629). Shoemaker's declaratory statement covered the said tract and was a valid and subsisting pre-emption filing thereon at the date of said definite location July 3, 1883. Was it a pre-emption of the tract? If it was, the company's right did not attach thereto, and it is immaterial that Shoemaker did not continue thereafter to hold such right and take the other necessary steps to acquire complete title to the land. Unless the company's right was superior to that of Shoemaker at the date last mentioned it never had any right to the land under its grant and it cannot be heard to complain against Eidson's subsequent entry.

A pre-emption as applied to a tract of public land is a preferred right to purchase the same, and is initiated by settlement and filing a declaratory statement (*Frisbie v. Whitney*, 9th Wall., 187; and *Smith v. Brearly*, 9 L. D., 175). In common parlance one is said to have "pre-empted" a tract of public lands when he has lawfully initiated a claim thereto in the manner above indicated. The word just quoted as found in the grant to said company is to be regarded as having been used in this sense and not in the narrow and restricted sense contended for by the company as applying only to land which had been regularly entered and paid for. No reservation of such land would have been necessary in the grant since the pre-emptor who had thus entered the land and paid the purchase money therefor would have acquired a vested right thereto of which an act of Congress could not divest him. The land would no longer have been the property of the government nor subject to appropriation under the grant (*Frisbie v. Whitney*, *supra*). In the case of this same company *v. Barrett*, decided March 13, 1891 (12 L. D., 232), it was held that land covered by a prima facie valid pre-emption filing at the date the company filed its map of definite location was pre-empted land, and as such excepted from its grant under the act aforesaid.

In accordance with the views therein and herein expressed I affirm the decision of your office in this case.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

ROBERT E. SALTMARSH.

The right of purchase granted by section 3, act of September 29, 1890, to persons who settled with the intent to purchase from the company, is a personal right, and not transferable.

Secretary Smith to the Commissioner of the General Land Office, March 6, 1896. (F. W. C.)

I have considered the appeal of Robert E. Saltmarshe from your office decision of October 8, 1894, holding for cancellation his cash entry made under the provisions of Sec. 3, of the act of September 29, 1890 (26 Stat., 496), covering the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$, Sec. 17, T. 2 S., R. 14 E., The Dalles land district, Oregon.

This land is a portion of that granted by the act of July 2, 1864 (13 Stat., 365), to aid in the construction of the Northern Pacific railroad. It is opposite the portion of said road which was not constructed, and was therefore included in the forfeiture declared by the first section of the act of Congress, approved September 29, 1890, *supra*.

By the third section of said act, a right of purchase to the extent of 320 acres is granted: first, to those persons in possession of any of the lands forfeited under deed, written contract with, or license from the

state or corporation to which the grant was made, or its assignees, executed prior to January 1, 1888; and second,

where persons may have settled said lands with *bona fide* intention to secure title thereto by purchase from the state or corporation, when earned by compliance with the conditions, or requirements, of the granting act.

The present claimant had not settled upon said land prior to the declaration of forfeiture, but claims to have purchased from a prior settler.

The question at issue is whether not only a settler upon railroad lands at the date of such forfeiture act, but the assignee of such settler, is entitled to purchase under the provisions of the third section of the act of forfeiture above quoted.

After a careful consideration of the matter I am of the opinion that the privilege granted to those persons who had settled with *bona fide* intent to purchase from the company, was a personal right and could not be transferred. While a subsequent settler might, under the general settlement laws, make entry of the land, yet the special right of purchase granted settlers by the third section of the act of forfeiture is not transferable. The two classes recognized and granted the right of purchase by the act of forfeiture are widely different; those in possession under a deed, written contract with, or license from the company had a claim through the grant which they might transfer; while those who had merely settled upon the land without a deed, contract with, or license from the company had no such claim or right, either as against the company or the United States, as was transferable, and in recognizing the latter class and granting the right of purchase, the privilege granted was, as before stated, a mere personal right and could not be transferred to another by sale, after the passage of the act of forfeiture, of improvements made upon the land.

I therefore sustain your office decision and direct that the cash entry be canceled, but that the entryman be advised of his right and permitted to complete entry under the settlement laws, to the extent of a quarter section, if he is otherwise qualified and so desires.

STRONG v. PETTIJOHN ET AL.

Motion for rehearing denied by Secretary Smith, March 6, 1896. See Departmental decision of August 20, 1895, 21 L. D., 111.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHTS.

HASTINGS AND DAKOTA RY. CO. *v.* CHRISTENSON ET AL.

Lands occupied and cultivated by qualified settlers, entitled to make entry thereof, are not subject to indemnity selection, and the recognition of such right of entry, though irregular, may be permitted to stand.

Secretary Smith to the Commissioner of the General Land Office, March 6, 1896. (J. A.)

August 6, 1892, Ole F. Bronniche presented homestead application for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and Jens Christenson presented application to make additional homestead entry under the act of March 2, 1889 (25 Stat., 854), for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ of section 21, T. 120 N., R. 40 W., Marshall, Minnesota, land district.

With their applications Bronniche and Christenson presented affidavits setting forth that they settled on the land in 1873 and 1874, respectively, and have continuously occupied and cultivated the same.

Both applications were rejected by the local officers August 8, 1892, for conflict with the Hastings and Dakota Railway Company's selection of October 29, 1891.

The land is within the twenty mile limits common to the grants of the Hastings and Dakota, and St. Paul, Minneapolis, and Manitoba Railroad Companies, the withdrawals for which were ordered in 1868 and 1869, and continued in force until May 22, 1891, when they were revoked (12 L. D., 541).

On October 16, 1883, the St. Paul, Minneapolis and Manitoba Railroad Company selected the land, but its selection was canceled October 23, 1891, (13 L. D., 440), and the land was held subject to entry by the first legal applicant, or to selection by the company first presenting application therefor.

October 29, 1891, the Hastings and Dakota Railway Company selected the land. Because of this selection the homestead applications of Bronniche and Christenson were rejected by the local officers.

On appeals filed by the applicants your office, on October 24, 1894, held that they acquired no right as against the railroad company by making settlement on the land while it was in a state reservation under the withdrawals of 1868 and 1869, but that immediately upon the revocation of the withdrawals, on May 22, 1891, and until selection by the Hastings and Dakota Railway Company, on October 29, 1891, the land was subject to the claim of the first qualified settler or applicant; and that, as Bronniche and Christenson were such applicants on August 6, "1891," they are entitled to the preference right of entry. The selections of the Hastings and Dakota Railway Company, made October 29, 1891, of said tracts were therefore held for cancellation.

February 11, 1895, your office transmitted the company's appeal from said decision.

By letter of August 20, 1895, your office transmitted additional papers in the case, reporting that the same were not on file when the case was decided on October 24, 1894. These papers show that on March 28, 1894, Bronniche and Christenson again presented applications to make entries for the tracts originally applied for by them, alleging settlement and occupancy since 1873 and 1874, respectively. The Hastings and Dakota Railway Company filed protests executed April 11, 1894, (date of filing not shown) against the allowance of entries by the applicants. January 29, 1895, Bronniche was allowed to make homestead entry, and on February 14, 1895, Christenson was allowed to make additional homestead entry.

The company's appeal, transmitted by your office February 11, 1895, assigns error in substance.

1. In passing upon the case in the absence of notice to the company of said homestead applications.

2. In not holding that it was necessary for the applicants to reside on the land on October 29, 1891, the date of the company's selection.

It does not appear from the record whether the company was notified of the applications presented by Bronniche and Christenson August 6, 1892, and March 28, 1894. However, by filing protests, executed April 11, 1894, against the allowance of entries by Bronniche and Christenson, it waived notice of the applications.

It was not necessary for Bronniche and Christenson to reside on the land at the date of the company's selection. That they were in possession of and cultivating the land October 29, 1891, it is not denied by the company. They were therefore entitled to the right of entry, and their entries, although irregularly allowed January 29, 1895, and February 14, 1895, respectively, will be permitted to stand.

The decision of your office holding for cancellation the company's selections of the tracts in controversy is affirmed.

PRE-EMPTION—SETTLEMENT RIGHTS—UNSURVEYED LAND.

BENNETT *v.* NUCKOLLS.

As between two settlers on the same tract prior to survey, one of whom is qualified, and the other disqualified by reason of minority, the existing adverse right of the former precludes the claim of the latter on attaining his majority, as against the right of said qualified settler.

The administrator of a deceased settler, who dies prior to the survey of the land settled upon, is authorized, after survey, to file a pre-emption declaratory statement for such land and perfect title thereto.

Secretary Smith to the Commissioner of the General Land Office, March 6, 1896. (W. M. W.)

I have considered the case of Joseph F. Bennett, administrator of the estate of George W. Sagers, deceased, against George H. Nuckolls,

involving the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 20, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 21, T. 7 S., R. 92 W., 6th P. M., Glenwood Springs land district, Colorado.

On May 8, 1889, the approved township plat of the survey of township 7 S., range 92 W., 6th P. M., was filed in the local land office, and on that day the pre-emption declaratory statements of the parties hereto were presented for filing, and on June 20, 1889, were filed. Nuckolls's statement covered the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, in said township, and alleged settlement on January 14, 1889.

Bennett, as administrator of the estate of George W. Sagers, filed his declaratory statement on behalf of the estate of Sagers covering the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 21, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20 of said township, alleging settlement September 1, 1884.

Nuckolls gave notice that he would make final proof on September 30, 1889, and on that day Bennett filed an affidavit of contest, alleging, among other things, priority of settlement on the land in dispute by Sagers; failure to improve or cultivate the same; that Nuckolls

is not competent or qualified, and should not be permitted to enter said land or any portion thereof, and especially as against this contestant, said Geo. W. Sagers being the prior appropriator, occupant and claimant of the north 80 acres of the land which contestee seeks now to enter.

A hearing was ordered by the local officers, at which the parties appeared, and on motion of Nuckolls the contest was dismissed. Bennett appealed to your office, which, on the 27th day of May, 1892, reversed the order dismissing the case, and remanded it for hearing. The hearing was had, and the local officers recommended that Nuckolls' final proof be accepted and the contest dismissed.

Bennett appealed, and on December 4, 1893, your office reversed the judgment of the local officers and awarded the land involved to Bennett.

Nuckolls brings the case here on appeal from said decision.

The evidence shows that in 1884 the father of Nuckolls bought from a former occupant the possessory right to the land in controversy; that this, with other lands amounting in all to over 1,000 acres, was used as a cattle and horse grazing ranch by the firm of Reef and Nuckolls; that both of the Nuckolls were members of the firm of Reef and Nuckolls; that at the time of this purchase, and up to January 14, 1889, the defendant was a minor and was not the head of a family. The firm of Reef and Nuckolls inclosed with a fence and natural obstacles the land involved, together with other lands, aggregating about 1,000 acres. There was a log house on the ranch about eighteen by forty, and this was used by the defendant and many of the employees of the firm of Reef and Nuckolls. Nuckolls in his final proof claims this house and other improvements made by the firm of Reef and Nuckolls on the land involved, as follows: a log house eighteen by forty, valued at \$300; a

mile of fencing, \$200; three corrals, \$200; two barns, \$100; a cellar, \$25; an irrigating ditch, \$400; twenty acres' plowing, \$75; about seventy-five acres of clearing; \$100; cropped to grain and grass from seventy-five to one hundred acres. These improvements were all paid for by the firm of Reef and Nuckolls, but the defendant testified that he paid said firm for them by services rendered for that firm. He also testified that he settled and occupied the tract for his own use and benefit; that it was just held by his father, by Henry Roach and his cousin William Nuckolls for the defendant. It appears that in a dispute between William Nuckolls and Sagers over the possession of the tract involved, on the 7th day of September, 1888, said Nuckolls shot and killed Sagers. After this killing William Nuckolls abandoned the land. Sagers was at one time an employee of Reef and Nuckolls, and while so employed asserted a settlement claim to one hundred and sixty acres of land within their inclosure, hereinbefore referred to; and in 1885 or 1886 had a cabin on it which he claimed as his home. In 1887, Sagers built a two-room log house on the land in controversy, and also moved his cabin to said land, and afterwards used it for a stable. Sagers continued to live on and improve the tract until his death, and his widow resided on it thereafter and was residing on it at the date of the hearing. Sagers was qualified to make pre-emption entry at the time he settled on the land and at the time of his death.

The principal specifications of error assigned by appellant relate to the holding in your office decision respecting the disqualification of Nuckolls as a pre-emptor by reason of his minority, as against Sagers' settlement. It is also claimed that an adverse claim can not be acquired prior to the filing of the approved township plat, and that the filing by Nuckolls of his declaratory statement on the day of the filing of said plat gave him an unquestionable prior and superior right to the land, inasmuch as he was at that time qualified to enter land under the pre-emption law.

Section 2259 of the Revised Statutes prescribes the qualifications of persons who may enter, under the pre-emption laws, public lands, as follows:

Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes settlement in person on public lands subject to pre-emption, etc.

Section 2266 of the Revised Statutes expressly recognizes settlements on the unsurveyed public lands made by qualified pre-emptors and protects all such for the period of three months from the date of the receipt at the district land office of the approved plat of the township embracing their pre-emption settlement.

This case presents the claims of two settlers for the same land at the same time, each based on actual settlement; one of them being qualified to enter the land, and the other disqualified to make such entry.

In *James F. Bright*, 6 L. D., 602, the Department held that though a filing made by a pre-emptor under disability of infancy is invalid, such invalidity is cured by the attainment of majority prior to the inception of an adverse claim.

In *Florida Railway and Navigation Company v. Williams*, 14 L. D., 288, in construing a relinquishment made in favor of "actual bona fide settlers," it was held that such relinquishment does not extend to one who was at the date of the relinquishment not a qualified settler by reason of being a minor, and not the head of a family. In the opinion Secretary Noble said:

No discussion, it seems to me, is necessary to show that "an actual *bona fide* settler" must be one capable of acquiring title from the government—that is, he must be qualified to make settlement and entry under some one of the land laws. A minor, not the head of a family, equally with an alien, is disqualified to make settlement, filing, or entry, or to initiate any rights under the land laws, and the settlement, occupation, and improvement of one so disqualified will not except the land settled upon from the operation of a grant to a railroad. *Central Pacific R. R. Co. v. Taylor*, 11 L. D., 354; *Same v. Booth*, id., 89; *Titamore v. Southern Pacific R. R. Co.*, 10 L. D., 463.

In *Bomgardner v. Kittleman*, 17 L. D., 207, the Department held, that the infancy of a pre-emptor at date of filing declaratory statement will not defeat the pre-emptive right, if the pre-emptor attains the requisite age prior to the intervention of any adverse claim, and good faith is otherwise shown. Numerous decisions of the Department to the same effect might be cited in cases where the claimants were aliens. The rule is uniform and unbroken that in all cases of settlement or filing when the claimant is disqualified he can acquire no right by either until after the disqualification is removed; if during the time the disability exists a claim, whether by settlement or filing, is initiated by a competent claimant to the land claimed by the person disqualified, the initiation of such claim defeats the right of the disqualified claimant. In other words, if any adverse claim intervenes as against the settlement or filing of one disqualified to make entry of public lands, it operates to defeat the right of such disqualified person to the land involved as against such adverse claim, for the reason that such disqualified person can have no claim to the land until the disqualification is removed. It follows that Nuckolls' occupancy and cultivation of the land involved during the time of his minority did not invest him with any right to it under the pre-emption law as against the settlement, residence and improvement of the land by Sagers or his administrator under said law.

The claim is made that no rights of the parties could attach to the land in question under their settlements until the filing of the plat of the survey in the local land office, and as Nuckolls had at that time attained his majority, the land should be awarded to him as the first settler. In support of this contention, the case of *Lord v. Perrin*, 8 L. D., 536, is relied on. The facts in that case are very different from the facts in the case at bar. In that case the plat was approved in

December, 1884, and filed in the local office in January, 1885. Perrin was a foreigner by birth, and on November 3, 1894, declared his intention to become a citizen of the United States. Both Perrin and Lord had improvements on the tract in controversy; each of the parties acquiesced in the possession of the other before and after the plat of the survey was filed in the local office. Lord acquiesced and recognized by his acts the right of Perrin, while he was disqualified as well after he became qualified to make entry of the land. He even made out Perrin's declaratory statement, and sent it to the local land office after the township plat was filed, and received pay from Perrin for so doing. The facts in this case are totally different. Sagers did not in any way recognize Nuckolls' right to any part of the land involved, either before or after he attained his majority.

The case of *Buxton v. Travers*, 130 U. S., 232, cited by Secretary Noble in support of his decision in *Perrin v. Lord*, *supra*, and relied on by counsel in this case as supporting his contention, utterly fails to sustain such contention. The questions decided in that case are aptly covered by the syllabus, as follows:

No portion of the public domain, unless it be in special cases, not affecting the general rule, is open to sale until it has been surveyed, and an approved plat of the township embracing the land has been returned to the local land office.

A settler upon public land, in advance of the public surveys, acquires no estate in the land which he can devise by will, or which, in case of his death intestate, will pass to his heirs at law, until, within the specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys have preceded settlement, and performs the other acts prescribed by law.

In this case there is no question as to when the land involved became open to sale, nor is there any question as to whether the parties acquired such an estate in this land as could lawfully be devised by will or would pass to their heirs at law in case of death intestate of the parties. But the question is, whether a person qualified to enter public land under the pre-emption law could acquire a right to make such entry by his settlement, residence, improvement and cultivation on such land as against the settlement, residence, etc., of one who was not qualified to enter public land under said law.

The assignments of error in appellant's appeal seem to raise the question as to whether an administrator of a deceased settler, who dies prior to the survey of the land settled on, is authorized to file a pre-emption declaratory statement for the land settled on and make final proof in such a claim.

Without stopping to inquire whether this question properly arises in the record of this case as it now stands, it is sufficient to say that the Department has settled this very question adverse to the contention of appellant. See *Harbin v. Skelley* (16 L. D., 161); and the same rule has been held to apply under the homestead law. See *Patton v. George* (20 L. D., 533).

Your office held that the qualified settler could acquire a right to

enter by reason of settlement, etc., as against a disqualified settler, and I concur in such holding. The decision appealed from is accordingly affirmed.

HOMESTEAD ENTRY—WIDOW—MARRIAGE.

MACMARTIN *v.* SPORTSMAN.

On the submission of homestead final proof by a woman, claiming as the widow of a homesteader, the validity of her marriage to the decedent will not be questioned by the Department, at the instance of a protestant, in the absence of proper judicial proceedings to annul the said marriage.

Secretary Smith to the Commissioner of the General Land Office, March 6, 1896. (E. B.)

The record in this case shows that Rebecca H. Sportsman as widow of Andrew A. Sportsman who died March 11, 1894, made final proof and received final homestead certificate No. 1170, February 8, 1895, for the SE. $\frac{1}{4}$ section 28 T. 12 N. R. 2 W. Oklahoma City, Oklahoma, for which the latter made homestead entry No. 273, December 20, 1890. Several affidavits of contest filed against the entry were duly dismissed at the instance of the parties making the same, or by reason of default, prior to the issuing of the said final certificate. One Mary Sportsman had filed a protest against the entry alleging herself to be the legal widow of the entryman by a former marriage, but she subsequently and prior to the making of final proof dismissed her protest and filed a relinquishment to the United States of all interest in the land.

An affidavit of contest directed against the right of said Mary Sportsman, only, as alleged widow under said entry, and alleging failure on her part only to cultivate, improve and reside upon the land as required by law was filed by Daniel F. MacMartin, September 12, 1894. This affidavit having ceased to be of any force by reason of the said relinquishment of Mary Sportsman, was dismissed at the instance of MacMartin, February 15, 1895. April 8, 1895, under permission previously given by your office, MacMartin filed an application to be allowed to contest the entry, alleging that Rebecca H. Sportsman is not the legal widow of Andrew A. Sportsman, the deceased entryman, and therefore was not entitled to make final proof and to receive the final certificate for the land.

August 8, 1895, your office rejected MacMartin's said application, finding, in addition to the facts as to said Mary Sportsman's relinquishment, the dismissal of MacMartin's affidavit to contest, and the issuance of final certificate to Rebecca H. Sportsman, as hereinbefore given, that the marriage of said Andrew A. Sportsman and Rebecca H. Sportsman, November 29, 1891, was shown by record evidence, and, in its decision your office also further stated:

There is no disposition on the part of this (your) office to enter upon an investigation of the question whether or not the entryman's marriage with Rebecca was a

lawful one. She was the wife of the entryman, *de facto*, married under license regularly issued, and the validity of this marriage cannot be attacked in any proceeding before this (your) office. From the decision of your office MacMartin appeals.

He appears simply as a protestant in this case. The alleged widow, Mary Sportsman, is asserting no right nor interest under said entry, but, on the contrary, has made express relinquishment of all claim thereunder, or to the land itself. Duly certified copies of the marriage license and certificate show that such license issued in Oklahoma county, Oklahoma Territory, November 27, 1891, and that the marriage ceremony between Rebecca and the deceased entryman was celebrated in the same county two days later. On the other hand no evidence of a subsisting marriage at the last mentioned date between the said entryman and Mary Sportsman has been filed.

The case is between the government and Rebecca H. Sportsman alone. On the face of the record she was clearly the *de facto* wife of the entryman from the date of her marriage up to the death of the latter, and is now his widow. The laws of Oklahoma limit the institution of proceedings to annul a marriage, on the ground alleged in this case, to the parties themselves during the lifetime of both, or to the former wife (Statutes of Oklahoma, 1890, sections 3371 and 3372). In the absence of proper proceedings there the Department will not question the validity of this marriage at the instance of the protestant MacMartin. The decision of your office is affirmed.

RAILROAD GRANT—ACTS OF APRIL 21, 1876, AND JUNE 15, 1880.

NORTHERN PACIFIC R. R. CO. *v.* COBERLY.

The right of a railroad company acquired by definite location is not such an intervening adverse claim as will defeat the right of purchase conferred by section 2, act of June 15, 1880.

The exercise of the right of purchase conferred by section 2, act of June 15, 1880, is a compliance with law that brings the homestead entry within the intent and meaning of section 1, act of April 21, 1876.

A homestead entry made prior to receipt of notice of withdrawal on general route, and canceled prior to definite location, for failure to submit final proof within the statutory period, but subsequently perfected under section 2, act of June 15, 1880, is within the confirmatory provisions of section 1, act of April 21, 1876.

Secretary Smith to the Commissioner of the General Land Office, March 6, 1896. (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad Company from your office decision of January 26, 1891, holding for approval for patent the cash entry of Lucy A. Coberly, covering the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 13, T. 10 N., R. 18 W., Helena land district, Montana.

This land is within the limits of the withdrawal upon the map of general route of the main line of said road, filed February 21, 1872, and, as shown by the map of definite location filed July 3, 1882, it fell within the primary or granted limits.

Prior to the receipt of the order of withdrawal upon the map of general route at the local office, to wit, on May 3, 1872, Lucy A. Coberly made homestead entry of this land, which entry was canceled by your office September 11, 1879, for failure to submit final proof within the period required by law.

On July 24, 1883, however, she was permitted to make purchase of this land under the provisions of Sec. 2 of the act of June 15, 1880 (21 Stat., 237).

The first section of the act of April 21, 1876 (19 Stat., 35), provides:

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

It is clear that the facts relative to the entry under consideration meet the conditions necessary to confirmation under said section, provided the entryman has shown compliance with law. While it is true that her entry was canceled in 1879, for failure to submit proof within the statutory period, yet there can be no question but that upon the passage of the act of June 15, 1880, she might have been permitted to have purchased the entry under the provision of section two of said act, which is as follows:

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

Prior to her application to purchase in 1883, to wit, in July, 1882, the company filed its map of definite location opposite this land. The only question therefore for consideration is as to whether the right of purchase existing in claimant, not having been asserted prior to the definite location of the road, was thereby defeated.

It will be noticed that the right of purchase is granted conditioned only that this "shall in no wise interfere with the rights or claims of

others who may have subsequently entered such lands under the homestead laws."

There can be no question but that completing entry under this provision of the statute is a due compliance with law within the meaning of the act of April 21, 1876, *supra*, and as the only exception to the right of purchase granted by said section two of the act of June 15, 1880, is in favor of those subsequently entering the land under the homestead laws, I am clearly of the opinion that the fact that the right of purchase granted by said section was not asserted until after the definite location of the road, can not inure to the benefit of the company; in other words, that the company can not claim the benefit of the exception intended to be granted by the statute only in favor of subsequent homestead settlers.

I must, therefore, hold that the exercise of the right of purchase under the act of June 15, 1880, is a compliance with the law within the meaning of the act of April 21, 1876, and that the entry in question was confirmed thereby and that patent should be issued under the act of 1876 in favor of claimant as therein directed.

Your office decision is therefore affirmed.

HOMESTEAD CONTEST—FORCEFUL ENTRY—SETTLEMENT RIGHTS.

TUSTIN *v.* ADAMS.

No settlement right is acquired by forcible entry upon land legally occupied by another claimant.

The right of entry will not be accorded to a homestead applicant who, with full notice of the prior equities of an adverse claimant, fraudulently seeks to secure title through legal technicalities.

Secretary Smith to the Commissioner of the General Land Office, March 6, 1896. (W. A. E.)

The tract here involved, viz: the NW. $\frac{1}{4}$ of Sec. 31, T. 13 N., R. 19 E., North Yakima, Washington, land district, is within the primary limits of the grant to the Northern Pacific Railroad Company, branch line, the withdrawal for the benefit of which became effective July 11, 1879. Map of definite location was filed May 24, 1884.

On November 11, 1876, one Sampson Chambers filed pre-emption declaratory statement for said tract, but, as appears from his own affidavit submitted with this contest, never resided upon or improved it during the existence of his filing.

In 1880, J. M. Adams, who was at that time receiver of the land office at North Yakima, took possession of the tract, and began fencing, irrigating, and otherwise improving it. Supposing, under the rulings of the Department at that time, that it was railroad land, he filed with the Northern Pacific Railroad Company his application to purchase said tract when the company should have acquired title thereto, and on

June 22, 1881, he received from the general land agent of said company a card acknowledging the receipt of his application.

In the spring of 1884, Joshua L. Tustin built a small house on one corner of the tract, and on March 21, 1884, he filed his homestead application for the land. This application was rejected for the reason that:

It does not appear or is not shown that the tract was occupied bona fide at the date of withdrawal of June 11, 1879, for the benefit of the branch line of the Northern Pacific Railroad.

Tustin appealed, and a hearing was ordered by your office to determine the status of the tract. At this hearing, which was held on May 7, 1884, Adams was allowed to intervene. The record of the evidence submitted at said hearing remained in the local office unacted upon until September 20, 1888, when it was sent up with the report that the case had been dismissed at the request of all parties, Tustin having filed a dismissal of his contest on September 7, 1888.

July 30, 1889, Adams, who had become register of the land office at Spokane, Washington, filed his timber culture application for said tract. This application was withdrawn by his attorney on September 21, 1889, and on the same day the tract was listed by the Northern Pacific Railroad Company.

December 13, 1889, Mrs. Francis M. Tustin applied to enter this tract as a homestead, alleging in an affidavit filed with her application that she was the wife of Joshua L. Tustin, and that she had been deserted by him on December 6, 1889. Said application was rejected on account of the railroad selection, and Mrs. Tustin appealed.

February 19, 1890, Adams applied to have his timber culture application reinstated, on the ground that it had been withdrawn without his authority. This being denied, he appealed.

March 31, 1890, your office held the selection of the railroad company for cancellation, and rejected Adams's timber culture application, for the reason that he was a public land officer at the time said application was filed. Mrs. Tustin's application was not passed upon.

The railroad company appealed. Adams did not appeal, but on April 18, 1890, he applied to enter this tract under the homestead law (his term as register of the Spokane land office having expired March 4, 1890), and filed a number of affidavits in support of his claim. This application and the accompanying affidavits were transmitted for consideration with the pending appeal of the company.

About December 1, 1890, Adams died, and on December 23d, following, his widow, Mrs. Phoebe D. Adams, applied to make homestead entry of the tract in question. Said application was rejected on account of the pendency of the railroad company's appeal and the prior application of Mrs. Tustin, and from this action Mrs. Adams appealed. She also filed motion for leave to intervene in the contest between Mrs. Tustin and the railroad company, and this motion, together with all other papers filed by her, was forwarded to the Department.

January 21, 1892, the Department affirmed your office decision in so far as it held the railroad company's selection for cancellation, and returned the respective appeals of Mrs. Tustin and Mrs. Adams to be considered by your office.

By letter of April 19, 1892, your office held that both in law and equity Mrs. Adams had the better claim to the tract, and awarded the right of entry to her.

Mrs. Tustin appealed, and on July 7, 1893, a hearing was ordered by the Department to determine more clearly the respective rights of the parties.

In accordance with said instructions a hearing was had before the register and receiver at North Yakima, beginning June 25, 1894.

September 19, 1894, the local officers rendered their decision in favor of Mrs. Adams, and on appeal by Mrs. Tustin your office, by letter of April 26, 1895, affirmed their action.

Mrs. Tustin's further appeal brings the case again before the Department.

The evidence shows that from the time J. M. Adams took possession of this tract in 1880 up to the date of his death he was constantly improving it; that he brought water several miles to irrigate it; that at the time of his death, practically the whole tract was irrigated and under cultivation; and that he had thereon a good dwelling house and several outhouses. Since his death his wife and children have continued to reside on the land.

In 1888, Adams, in order to settle the dispute between himself and Joshua L. Tustin, paid Tustin \$540 to relinquish his contest, abandon all claim he might have to the tract, and change his residence. There is a conflict of testimony as to whether Mrs. Tustin was cognizant of this agreement (though a preponderance of the evidence shows that she was), but that question is immaterial, as during the time that Mr. and Mrs. Tustin lived together in the marriage relation he alone had the right to make homestead entry, and consequently his acts in regard to this land bound her. About the last of May or first of June, 1889, Tustin and his wife moved to the Big Bend country, one hundred and fifty miles distant, where Tustin filed pre-emption declaratory statement for a certain tract in Douglas county, Washington. They camped on this pre-emption tract in the Big Bend country for two days, and then went to the home of Mrs. Tustin's mother, adjoining the land in controversy, where they remained three weeks. At the expiration of that time, they again took up their residence in the house they had formerly occupied on the tract in dispute, the same house that Tustin had sold to Adams only a short time before. The testimony is conflicting as to whether or not they made a forcible entry on the land at this time. A preponderance of the evidence shows, however, that at the time the Tustins made their original settlement in 1884, Adams had all the tract

enclosed with a wire fence, except one corner down under a hill; that Tustin built his house on that unenclosed corner; that afterwards Adams extended his fence entirely around the tract and Tustin made an opening therein for entrance and exit; that after Tustin and his wife left in the spring of 1889 Adams had the opening closed; and that when the Tustins returned to the land they broke the fence to get in. December 6, 1889, Joshua L. Tustin left, and three days later Mrs. Tustin made out her homestead application as a deserted wife, filing the same on December 13, 1889. A decree of divorce was granted Mrs. Tustin on July 13, 1891.

No improvements have been placed on the land by Mrs. Tustin since her return from the Big Bend country. In the fall of 1890 she attempted to have some plowing done, but was restrained by injunction.

It is claimed on behalf of Mrs. Tustin that as J. M. Adams was a public land officer almost continuously from July 8, 1880, to March 4, 1890, his occupation of this tract was illegal, and therefore no bar to the settlement of the Tustins.

In the circular of November 7, 1879, relative to the adjustment of railroad grants, the following language was used:

A pre-emption claim which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned and not consummated, even though in all respects legal and bona fide, will not operate to defeat the grant, it being held that upon the failure of such claim the land covered thereby inures to the grant as of the date when such grant becomes effective.

Again, in the case of *Freeman v. Texas & Pacific Railway Company*, 2 L. D., 550, it was held that the burden of proof rests upon a party applying to make a pre-emption filing for land within the limits of a withdrawal for a railroad grant covered by pre-emption filings at the date of the grant and of the withdrawal to show affirmatively that at said dates a valid subsisting adverse right had attached to the premises.

This was the ruling of the Department down to the date of the decision in the case of *Malone v. Union Pacific Railroad Company*, 7 L. D., 13, when it was held that the existence of a prima facie valid pre-emption filing, at the date when the right of the road attached, excepts the land covered thereby from the operation of the grant.

Adams took possession of the tract under the old ruling of the Department, and applied to purchase from the railroad company. At the time the decision in the *Malone* case was rendered he had already spent a considerable sum in improving the land. When it became apparent under the changed ruling of the Department that this tract would be held to be excepted from the grant to the Northern Pacific Railroad Company, Adams filed his timber culture application for the land. He was at that time register of the Spokane land office, and under the existing rulings of the Department a register might make timber culture entry in a district other than the one in which he was

located. The instructions of August 28, 1883 (2 L. D., 313), to the register and receiver at Fargo, North Dakota, read as follows:

I am in receipt of the receiver's letter of July 7, 1883, in which the following question is submitted to this office:

"Is it admissible for a register or receiver or special agent or clerk to make a timber culture entry in a district other than the one in which he is located?"

I reply that I think such entry, excepting as to special agents, is admissible.

This circular was quoted and approved in the Lock Lode case, 6 L. D., 105.

The ruling thus made remained in force until February 3, 1890, when it was held in the case of Herbert McMicken et al., 10 L. D., 97, that the disqualification to enter public lands contained in section 452 of the Revised Statutes of the United States extends to officers, clerks, and employees in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

March 31, 1890, your office rejected Adams's timber culture application under the McMicken case, and on April 18, 1890, he filed homestead application for the land, his term as register of the Spokane land office having expired March 4, 1890.

In the case of Mary R. Leonard, 9 L. D., 189, it was said:

In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. . . . All that can be required of the citizen by any just government is, that he conform to the law as at the time expounded by its courts or other tribunals invested by it with such authority.

See also *Ohio Life and Trust Company v. Debolt*, 16 How., 432; and *Gelpcke v. City of Dubuque*, 1 Wall., 206.

It follows then that Adams's occupancy of this tract was a legal occupancy, and that the Tustins gained no settlement rights by their forcible entry on the land in 1889 (their settlement of 1884 having been abandoned when they moved to the Big Bend country). *Atherton v. Fowler*, 96 U. S., 513. Mrs. Tustin's claim must accordingly rest entirely on her homestead application.

The claim of the Northern Pacific Railroad Company to this tract was not finally disposed of until January 21, 1892, and at that time the homestead applications of both Mrs. Tustin and Mrs. Adams were pending, Mrs. Tustin's being the prior one. Other things being equal, priority of date would give priority of right, but the surrounding circumstances may be properly considered in the effort to arrive at a just conclusion.

The history of this case shows a struggle for years on the part of Joshua L. Tustin and his wife to get possession through legal technicalities of a tract which has been irrigated and improved by the labor and money of another. It is not a contest between two innocent settlers who have accidentally gotten upon the same quarter section, but a deliberate attempt by one party to profit at the expense of the other.

It is a fundamental principle that good faith must characterize every attempt to acquire title to public lands of the United States. The Department will not willingly lend itself to the furtherance of fraudulent designs. Thus, in the case of *Caldwell v. Carden*, 4 L. D., 306, it was held that as the settlement, residence, and cultivation of the homesteader were made with due notice of the bona fide claim and occupancy of another, no rights were acquired thereby, and the entry was ordered to be canceled. See also *Turner v. Bumgardner*, 5 L. D., 377.

All the equities in the present case are with Mrs. Adams. Your office decision awarding to her the right to perfect entry and rejecting Mrs. Tustin's application is accordingly affirmed.

WAGON ROAD GRANT—LISTED LANDS—TERMINAL LIMITS.

DUNCAN ET AL. v. THE DALLES MILITARY WAGON ROAD COMPANY.

An incomplete list of lands claimed by a wagon road company, and filed by it for the information of the local officers, who at such time were not in possession of a diagram showing the limits of the grant, is not a waiver of the company's right to lands omitted therefrom, as a list filed for such purpose is not a requirement of the grant.

The terminal limits of a grant are ascertained by drawing a line through the terminus of the road at right angles to the general direction of the last section of the road.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (J. A.)

On August 4, 1894, your office held for cancellation certain entries in T. 20 S., R. 47 E., W. M., Burns, Oregon, land district, for the reason that they were improperly allowed, as the tracts covered by them are within the primary limits of the grant of February 25, 1867 (14 Stat., 409) for The Dalles Military Wagon Road Company, and were withdrawn December 14, 1871. The action of your office was taken on said company's application forwarded by the local officers May 15, 1894, to list lots Nos. 1, 2, 3 and 4 of section 5, and all of sections 7 and 19, of said township and range.

By letter of February 8, 1895, your office forwarded the appeals of James M. Duncan, William T. Jones, and Frank M. Vines from said decision, and on March 5, 1895, your office forwarded an argument filed in behalf of the appellant Jones.

The following entries made by appellants are involved in this case: Homestead entry made by James M. Duncan January 15, 1893, for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lot 1 of section 7; Homestead entry made by William T. Jones December 30, 1893, for the NW. $\frac{1}{4}$ of section 7, and desert land entry made by him January 15, 1894, for the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 5 of section 7; and desert land entry made by Frank M. Vines January 16, 1894, for lots 2, 3 and 4, of section 7, T. 20 S., R. 47 E.

The appellants contend:

1. That the company has waived its right to the land because on July 29, 1890, it filed for the guidance of the local officers a list of lands claimed by it, in which list no lands east of range 45 were designated.

2. That a part of the tracts involved in this case are east of the eastern terminus of the company's road and therefore do not fall within the limits of the grant.

The company filed a list of lands claimed by it, in the local office on July 29, 1890, for the purpose of giving information to the local officers, who, at that time, had no copy of the diagram showing the limits of the grant. This list was incomplete, but the company was not required to file the same, and waived no rights by its action.

The plat of survey in your office of T. 20, R. 47 E., shows that the terminus of the road is at the ferry landing on the west bank of the Snake River in the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 19. The tracts in question fall west of a line drawn through that point at right angles to the general direction of the last ten miles (the length of a section under the company's grant) of the road, and are therefore within the limits of the grant. See *Daily v. Marquette, Houghton and Ontonagon R. R. Co. et al.*, 19 L. D., 148. The decision appealed from is accordingly affirmed.

With his argument Jones filed an affidavit alleging that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of section 7, included in his homestead entry, and lot 5 of section 7, included in his desert land entry, were settled upon and occupied by *bona fide* qualified settlers intending to acquire title to the same from the government, from 1867 to 1883, and were excepted from the grant of the company. He therefore prays that in the event of an adverse decision on his appeal a hearing be ordered to allow him to prove his allegations.

This affidavit is herewith returned, for proper action by your office.

PRACTICE—APPEAL—ATTORNEY.

SAMUEL H. BAXTER.

An appeal, taken by an attorney not authorized to practice in the Land Department, will not be entertained.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (R. F. H.)

December 22, 1894, I. H. Lookabaugh, Hobbs & Kane as attorneys for Samuel H. Baxter, filed an appeal from your office decision of October 10, 1894, denying his application to amend his homestead entry No. 11628, made January 12, 1894, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, SW. SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 29, T. 16 N., R. 10 W., to embrace in lieu thereof the NE. $\frac{1}{4}$ of Sec. 5, T. 15 N., of R. 13 W., Kingfisher land district, Oklahoma.

It appears from the records of your office that said attorneys are not

authorized to practice in the Land Department, and the files of the case show that said attorneys and claimant were duly notified thereof by registered letters, which were received by both attorneys and client, October 10, 1894, and February 5, 1895, respectively, since which time no action in the case has been taken on the part of either.

In view of the foregoing facts, the appeal was irregular and unauthorized, and the same is accordingly dismissed.

RAILROAD GRANT—INDEMNITY SELECTION.

SOUTH AND NORTH ALABAMA R. R. Co. v. HALL.

The status of indemnity lands at the date of selection, not definite location of the road, determines the right of the company thereto.

Secretary Smith to the Commissioner of the General Land Office, March, (J. I. H.) 7, 1896. (J. L.)

This case involves the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 19, T. 20 N., R. 15 E., Montgomery land district, Alabama.

On November 6, 1889, Robert G. Hall made homestead entry No. 23,180 of said tract. On December 6, 1881, the South and North Alabama Railroad Company per list No. 1, made indemnity selection of said tract; claiming under the grant to the State of Alabama made by the act of June 3, 1856 (11 Stat., 17), and renewed for the benefit of the South and North Alabama Railroad Company by the act of March 3, 1871 (16 Stat., 580). The line of said company's railroad opposite said tract was definitely fixed on June 26, 1871, by the filing of the map of definite location; and the land in question was within the fifteen mile indemnity limits ascertained by said map. At that time said tract was covered by one William D. Morgan's homestead entry No. 1854 made September 16, 1869. Said entry remained of record until February 27, 1879, when it was canceled on account of failure to make final proof.

On January 22, 1895, your office upon the foregoing facts, decided that said land did not pass under the grant, and held for cancellation the company's selection of said tract.

The company has appealed to this Department.

Your office erred in not distinguishing the difference between lands within primary limits, title to which vests on the filing of the map of definite location under the grant and as of the date thereof, and lands within indemnity limits, title to which can be claimed only by selection, and acquired only by the approval of the Secretary of the Interior. The tract in question was part of the public domain open to settlement and entry on December 6, 1881, when the company selected it by list No. 1. The filing of said selection segregated the tract, and Hall's homestead entry thereof on November 6, 1889, was erroneously allowed.

Your office decision is hereby reversed. The company's selection will be approved. And Hall's entry will be canceled.

MINING CLAIM—ADVERSE CLAIM—JUDICIAL PROCEEDINGS.

SCOTT v. MALONEY.

The obligation of an adverse claimant to begin judicial proceedings within the statutory period is not suspended by favorable action taken on a motion to dismiss the adverse claim, and appeal therefrom.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (E. B.)

Against the application of Richard M. Maloney for patent for the American Express No. 2, American Express No. 1, No Mistake and Pidcock lode claims then pending before the register and receiver at Rapid City, South Dakota, Joseph Scott, as administrator of the estate of Thomas H. Breen, filed an adverse claim July 19, 1894, the last day of publication, alleging a conflict between the Dunlap and Emma S. lode claims, and the said American Express claims Nos. 1 and 2. Upon motion of Maloney the adverse claim was dismissed by the local officers August 11, 1894.

An application by said Maloney to purchase was denied by the local officers August 24, 1894, on the ground that the time allowed for appeal from the decision dismissing the adverse claim had not yet expired. On the date last mentioned the certificate by the clerk of the state court having jurisdiction in the premises, and five days thereafter the certificate of the clerk of the proper United States circuit court, were filed as required by paragraph 92 of mining regulations, showing that up to August 20, 1894, the necessary suit had not been begun by the adverse claimant.

From the decision dismissing the adverse claim, and the decision denying the application to purchase the respective parties duly appealed to your office. On December 4, 1894, your office affirmed the action of the local office as to the refusal to allow purchase by Maloney, held the adverse claim sufficient and overruled the action dismissing it, and further decided

that the contestee having filed a motion in your (local) office to dismiss the adverse claim before the expiration of the thirty days allowed for commencing a suit thereon, the adverse claimant was not bound to commence his action in court pending proceedings in the Land Department upon said motion; but in case this decision becomes final the adverse claimant will be allowed twenty days from notice of such official decision within which to commence suit, and in case of default the adverse claim will be held to have been waived.

From this decision said Maloney appeals contending that the failure of the adverse claimant to commence the suit required by section 2326 Revised Statutes within thirty days after filing his adverse claim was a waiver of such claim, and that your office erred in sustaining the denial to allow him to purchase the ground claimed. The parties appear to have had due notice of all proceedings.

The statutory proceedings relative to an adverse claim against an application for patent to mineral lands are contained in section 2326 Revised Statutes as amended by the act of April 26, 1882 (22 Stat. 49). So much of these provisions as are pertinent to this case are as follows:

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

The appeal raises the only questions necessary to be considered by me, or which should have been considered by your office, in view of the law and the facts in this case. The time within which suit could be commenced in a court of competent jurisdiction to determine the question of right of possession, so as to stay proceedings for patent in this case, expired August 18, 1894. Delay by the adverse claimant beyond this date, which marked the close of the thirty days allowed him by the statute, was at his peril. The dismissal of his adverse claim for any cause by the local officers could not excuse such delay.

Had he commenced suit in a competent court within the statutory period, and continued to prosecute it, the same would have operated to stay proceedings, at all events, until the sufficiency of his adverse claim had been finally determined. (Samuel McMaster, 2 L. D., 706, and Reed v. Hoyt, 1 Id., 603). Under these circumstances, or in the event of a judgment by the court in his favor, the question of the sufficiency of the adverse claim after August 18, 1894, might have been a material issue between the parties. Having failed to commence suit, the question of the sufficiency or insufficiency of the adverse claim, as such, after that date was unimportant. Such failure, the law expressly declares, "shall be a waiver of the adverse claim." The decision of your office upon the points raised by the appeal is accordingly reversed, and you will duly instruct the local officers in the premises.

SETTLEMENT RIGHTS—APPLICATION TO ENTER RESERVED LAND.

CROWLEY *v.* RITCHIE ET AL.

No rights are acquired by settlement on lands during the pendency of a departmental order expressly prohibiting such occupation.

An application to make entry of public land can not be allowed if based upon preliminary papers executed prior to the time when said land is legally subject to such appropriation.

Secretary Smith to the Commissioner of the General Land Office, March 7,
(J. I. H.) 1896. (C. J. W.)

Daniel C. Crowley filed in person at two minutes past 9 a. m., November 3, 1891, his application to enter the NW. $\frac{1}{4}$ of Sec. 9, T. 48 N., R. 7 W., Ashland land district, Wisconsin, alleging settlement thereon.

Margaret Ritchie, Chas. C. White, John Provost and John J. McCoy sent by mail applications to enter, Margaret Ritchie's application being for all of said quarter; Provost's for the north half; White's for south-west quarter of north-west quarter and McCoy's for south-east quarter of said north-west quarter.

All of these applications by mail were received at the land office prior to 9 o'clock a. m., on November 2, 1891, and all alleged settlement upon the land applied for and were all held to be simultaneous applications.

A hearing was ordered by the local officers to take place January 4, 1892, to determine the rights of the various parties. On said hearing the applications of all parties for said NW. $\frac{1}{4}$ were dismissed, except that of Margaret Ritchie, which was allowed. Crowley, Provost, White and McCoy all appealed.

On September 14, 1892, your office considered said case and found in favor of Margaret Ritchie and against all other parties.

The case came before the Department on appeal from your said office decision and on May 21, 1894, it was here held that the applications of Ritchie, McCoy and White were all made before the land was subject to entry and could not be allowed, and that the entry of Crowley be allowed. Ritchie moves for a review of said departmental decision and Provost for a new trial. Provost's motion for new trial is based on an affidavit filed by himself disputing the correctness of the facts found on the hearing, as to his acts of settlement. No sufficient ground for a rehearing is presented. The motion for review upon the part of Ritchie rests chiefly upon the insistence that it was error to hold that her application to enter, forwarded by mail and dated before said land was opened to entry, was a nullity.

A number of similar motions are pending which rest upon like grounds, and it becomes necessary to consider the merits of this objection. It is conceded that to sustain it would involve the necessity for the reversal of the holding in *Smith v. Malone* (18 L. D., 482), which grew out

of almost an exactly similar state of facts and was governed by the same law and special orders and regulations which apply in this case. In both instances the land involved was at the same time and for the same reason held in reservation and at the same time and under the same law and regulations opened to entry and settlement, and is in the same land district. It seems, that such attempts were made to found some sort of prior right to these valuable lands, while they were yet in reservation; that the Secretary of the Interior deemed it necessary to issue special orders and instructions to the register and receiver, to be followed in the disposition of these lands. These orders and instructions were considered at some length in the case of *Newell v. Hussey* (16 L. D., 302. See also letter of instructions 12 L. D., 259.) It is sufficient to say that they were such orders and instructions as the Secretary might lawfully issue; that they prohibited any settlement upon the lands prior to the hour of opening and gave notice that no such settlements would be recognized, and fixed 9 o'clock, a. m., November 2, 1891, as the time when said lands would be opened to entry at the land office.

Under the laws applicable to the entry of public lands generally, and the special orders opening these particular lands, it was held in the case quoted—

That no rights are required by settlement on lands during the pendency of a departmental order expressly prohibiting such occupation.

An application to make entry of public land can not be allowed if based on preliminary papers executed prior to the time when said land is legally subject to such appropriation.

In reference to the last proposition, the case is singled out and assailed with such earnestness and persistence as to indicate that this is a new doctrine of the law first announced in this decision. It is not a new doctrine, and to take the movant from out the operation of the rule announced would not only require the reversal of this but a long line of decisions which it follows.

In the case of *Johnson Barker* (1 L. D., 164), it is held that an affidavit made as the basis of an entry, while the land is under appropriation can not be received. The same principle is affirmed in the case of *Staab v. Smith* (3 L. D., 320) and *F. H. Merrill* (10 L. D., 364).

It is also clearly recognized in the case of *Maggie Laird* (13 L. D., 502). In the case of *Holmes v. Hockett* (14 L. D., 127) it is said: "An entry should not be allowed on an application and preliminary affidavit executed while the land is not legally liable to disposal." In the case of *Mills v. Daly* (17 L. D., 345), it is held that an application to enter to be valid must be made at a time when the land is free from appropriation and legally subject to entry.

It is apparent that to get rid of this doctrine would involve much more than the reversal of a single case. Counsel cite quite a number of cases as conflicting with this doctrine, in which it has been held

that an entry improperly permitted for land not subject to entry may be allowed to stand when the land is restored, before its cancellation. In all such cases it will be found that there was no adverse claim to be considered, and this line of cases is not in conflict with the main propositions announced in the case of *Smith v. Malone*, which is but a reiteration in terse and forceful terms of the principle long recognized here.

The remaining ground for review is that in this case, the settlement rights of Mrs. Ritchie should have been recognized as they were by the local officers and your office, as superior to those of Crowley. Her occupancy of the land prior to the opening on November 2, 1891, was violative of the orders and instructions of the Department, and indicated a disposition to get advantage of others and she can found no claim upon it. Such occupancy was illegal. It is as much as such occupant can expect when it is held that an occupancy thus founded and commenced while the land is in reservation and continued after it is opened to settlement, will be deemed a proper predicate for settlement rights, as soon as additional acts of settlement are performed, after the land is opened, which indicates a *bona fide* intention to occupy and improve it as a home.

In this case Mrs. Ritchie commenced improvements after the opening on November 16, 1895, but at that time Crowley's entry was of record and the land segregated. Under the facts disclosed by the record the rights of Crowley must, therefore, be held to be superior to those of Mrs. Ritchie.

The motion for review is refused.

PRE-EMPTION ENTRY—SECOND FILING.

ALLIE M. SANGSTER.

A pre-emption entry allowed on a second filing may be allowed to stand where it appears to have been made in good faith, believing the right to make such filing had been accorded by decision of the General Land Office.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (G. B. G.)

On June 6, 1884, Mrs. Allie M. Sangster (then Tilton) filed declaratory statement (pre-emption) for lands not necessary to describe in the Spokane Falls, Washington, land district.

On September 30, 1886, this filing was canceled by your office on report of a special agent to the effect that no improvements whatever had ever been made upon the land, and that residence had never been established thereon.

No appeal was taken from said action of your office, and its decision became final.

On November 8, 1889, Miss Tilton filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 4 and 5 of Sec. 6, T. 26 N., R. 41 E., same land district. Cash entry was made for this tract and final certificate issued November 8, 1889.

On February 14, 1893, your office held said cash entry for cancellation on the ground that the entryman had, by reason of her previous filing, exhausted her pre-emption right.

On appeal to the Department two specifications of error are alleged.

1st. The Commissioner erred in holding that the land embraced in claimant's former filing was capable of *bona fide* settlement and cultivation.

2d. The Commissioner erred in holding that claimant's pre-emption filing on land practically unfit for cultivation disqualifies claimant from making a second filing.

It is well settled that a pre-emption right once exhausted cannot be restored, except by act of Congress, and as a general rule, too, it has been held by the Department that one pre-emption filing exhausts such right; but in cases where it has been made to appear that for any reason, not the fault of the claimant, it would be impossible or impracticable to complete title to the land filed upon; such filing has been treated as a nullity, and a second filing allowed.

In the case at bar, the claimant, after the cancellation of her first filing, made application to your office to be allowed to make a second filing on the grounds, substantially, that she was at the time of her first filing a stranger in the neighborhood of the land filed upon; that she was misled as to the character of the land; that it was practically worthless for farming purposes without artificial irrigation; that it was impracticable to obtain water to irrigate it; and further that her application did not cover part of the land she thought she was filing upon, she believing it covered a lot on the river front.

This was dismissed by your office, "because of her failure to describe a specific tract", and she was so advised.

She then made her second filing, and now claims that she believed this to be what was required of her.

I am of opinion from a careful examination of the whole record that the claimant acted in entire good faith in making this second filing, believing that the showing she had made to your office was satisfactory, and that nothing else was required of her, except to "describe a specific tract" by filing upon it. I am confirmed in this view by a letter from her attorneys addressed to her under date of March 7, 1888, as follows:

Dr. Madam—

We are in receipt of a letter from the land office informing us that your application for restoration of pre-emption right will not be allowed unless accompanied by a filing for other land—please act accordingly.

Yours truly

In making her final pre-emption proof under her second filing, in answer to the question, "Have you ever made a pre-emption filing for land other than you now seek to enter?" she answered "I have, but did

not make proof on the land, and had my right restored, as the land was not agricultural land."

It is clear, therefore, that in making her second filing claimant was acting in entire good faith, believing that her right had been restored.

Under these circumstances the sufficiency of the showing made by her would not seem to be important, and will not now be inquired into. She has made valuable improvements. Final proof and payment have been made, and certificate issued. Under these circumstances an application for repayment could not be refused, if title is denied her.

There are no adverse claims. The claim was initiated prior to the repeal of the pre-emption law, and final certificate issued before the claimant married.

Under all the circumstances of the case, I am of opinion that claimant's final proof should be accepted, and the entry passed to patent.

SETTLEMENT RIGHTS—COMPLIANCE WITH LAW—INTIMIDATION.

FOOTE *v.* McMILLAN.

A contestant, who claims the right of entry on the ground of priority of settlement, must show compliance with the settlement laws, and the establishment and maintenance of residence in good faith.

Non-compliance with the law will not be excused on the ground of intimidation where it is apparent from the conduct of the party that the alleged threats did not lead him to believe that he was in danger of bodily injury.

Secretary Smith to the Commissioner of the General Land Office, March 7,
(J. I. H.) 1896. (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 3 and 4, Sec. 35, T. 129, R. 28, Watertown land district, South Dakota.

The record shows that on May 20, 1892, Wm. McMillan made homestead entry for the above described tract, and on June 6, 1892, Lyndon H. Foote filed his application to enter said land, and his affidavit of contest alleging prior settlement.

A hearing having been ordered and had before J. J. Batterton, county judge of Roberts county, South Dakota, and the evidence having been transmitted to the local officers, they, on March 2, 1894, rendered their decision in favor of the contestant.

Upon appeal, your office decision of August 8, 1894, affirmed the action of the local officers. The evidence shows that the plaintiff-appellant went on the land on April 15, 1892, and made settlement by erecting a small shanty, or pen, six by twelve feet, and about four and one-half feet high, without any roof, floor, or windows, and plowed a narrow strip around the house. During this time he and his family continued to live in his house situated about a mile from the land. About the last of May, but subsequently to the entry of the land by

McMillan, the contestant broke a strip eighteen feet wide and half a mile long. His improvements prior to the entry of the defendant amounted to only a very few dollars.

After entry, McMillan immediately built a house, started a well, established his home upon the land, and broke some ground. His improvements are worth about \$75 or \$100.

Foote was not living upon this land when McMillan made homestead entry. It does not appear from the evidence that the contestant ever lived upon the land. On the contrary, the reverse is shown to be the case. It would thus seem that his settlement was not made in good faith, when all the circumstances surrounding it are considered. The acts of settlement made by him would be sufficient in themselves to initiate a right by settlement if it appeared that he had acted in good faith and intended to reside upon the land, but his failure to make sufficient improvements upon the land, connected with the fact that he had a comfortable home within a short distance, leads the Department to believe that his settlement was not initiated in good faith.

But resolving all doubt upon this question in favor of the contestant, and assuming that his settlement was made in good faith, it appears upon a further examination of the record that from about the time of the filing of his affidavit of contest, up to the hearing in this cause, a period of nearly two years, he had not improved the land nor established his residence thereon. His failure to do this is alleged to be the result of threats of violence upon the part of the defendant-appellant.

In *Hall et al. v. Stone* (16 L. D., 199), it was held *inter alia* (syllabus):

A homesteader who claims priority of right by virtue of an alleged settlement, must comply with the settlement laws and cannot defer the establishment and maintenance of residence until the allowance of his application to enter.

This proposition was again announced in the recent case of *McInnis et al. v. Cotter* (21 L. D., 97), wherein it was said that:

One who claims the right to make a homestead entry on account of priority of settlement must show that the alleged settlement was followed by the establishment and maintenance of residence.

On page 98 of the same opinion, it is said:

It is maintained that as no entry had been allowed, McInnis was not compelled to keep up residence on the land pending such allowance. This position is not well taken. He must stand either upon his application to enter, or upon his settlement. He can gain no superior rights by the application inasmuch as it was made simultaneously with that of Cotter and McAlpine, and the only ground upon which he can stand being that of prior settlement, it became incumbent upon him, in order to present such a case as would lead to the allowance of his entry, to show not only prior settlement, as settlement in itself confers no rights to anyone, but continuous residence. This he has failed to do.

The law requires an entryman whose entry is under attack, to comply with the terms of the law. It is equally binding in this respect upon him who claims the right of entry in a contest proceeding by reason of a prior settlement. Having failed to establish and maintain

residence upon the land, as required by the Department in the case quoted, the contestant sets up as a reason for his failure to comply with the law, the making of threats upon the part of the defendant, which intimidated him and prevented him from so doing.

The testimony upon this question submitted at the hearing was as follows:

The contestant, Foote, testified that he sent his son upon the land to do some plowing; that the boy quit work and returned to him and stated

that McMillan and Mollison had ordered him off, and to stay off, and for him to come to see me and tell me if we did not keep off the land in question he had a right to shoot us;

that he saw the boy talking with McMillan and Mollison but did not hear what they said; that he went to see McMillan but found him in bed and he would not get up; that he was on the SW. $\frac{1}{4}$ of Sec. 1. T. 128, R. 48, when Mr. McMillan and Mollison were talking to his boy.

The witness, Breithauer, testified that Mr. Mollison told him that he and Mr. McMillan had told the boy that if he did not quit breaking upon the land, McMillan would have the right to shoot him.

Mr. McMillan states that he ordered the boy to cease work, but that there were no threats made about shooting.

Mr. Mollison stated that he advised the boy to stop breaking but that there was no shooting spoken of.

Upon this testimony, the local officers before whom the testimony was not taken, and whose opinion therefore fails to carry with it the special weight ordinarily attached to it by departmental decisions, held, in effect, that there was intimidation.

The decision of your office of August 8, 1894, made no further finding further than to say: "The defendant made entry of the land and ordered the contestant to keep off."

The burden of proof rests upon the contestant. This is a general rule of accepted authority (Greenleaf on Evidence, Vol. I., Sec. 74); nor did the burden shift upon the contestant showing prior settlement, as that in itself would not, as has already been shown, inure to any advantage to him since he is required to show a continuous residence, or give some legal excuse for his failure to do so and to meet this, he asserts intimidation.

The testimony of Foote and Breithauer is clearly incompetent as hearsay. American and English Encyclopædia of Law, Vol. IX, page 325.

Foote testified that his son said that Mollison and McMillan said that if he "did not keep off the land he (McMillan, presumably) would have the right to shoot them." Breithauer says that Mollison told him that he (Mollison) and McMillan had told Foote's son that "if he did not quit breaking on the land McMillan had a right to shoot him."

The testimony of Breithauer as to the declaration of Mollison is clearly inadmissible. There is no attempt made to show that it is a part of the *res gestæ*, and being hearsay it became incompetent. It may be said that while this is true of Breithauer's testimony, that of Foote is admissible as forming a part of the *res gestæ*. It is not shown what time had elapsed between the making of the threats, if they were made, and the alleged declaration of such threats by the son. In order to make such a declaration admissible as a part of the *res gestæ* it must be shown that the declaration was so nearly connected with the act in point of time as to make it a part of the transaction. It is not at all clear from the evidence that the declaration is brought within this rule. But conceding it to be admissible as a part of the *res gestæ* it does not strike me, in view of all the facts in the case, that Foote abandoned his settlement because of threats. His own subsequent conduct shows that he was not intimidated to the extent of being afraid of bodily injury at the hands of McMillan, inasmuch as he went to his house alone at 11 o'clock in the night.

The fact that Foote did not produce his son as a witness to prove these threats, or account for his absence will not render the declaration of his son inadmissible provided it is otherwise free from objection, but it is a very strong and significant fact toward showing that the testimony as to the threats is not entitled to much credibility.

When a party offers testimony which, from its nature, shows that there must be better evidence of the fact behind it, which evidence is not produced and the failure to produce it is not accounted for, all of the authorities agree that the credibility of such testimony is thereby seriously affected. Greenleaf on Evidence, Vol. I, Sec. 82; Clifton v. United States, 4 How., 242; The Sally Magee (3 Wall., 451).

Thus the failure to produce the son who could give the best evidence of the alleged threats of McMillan, can but operate to affect the credibility of the testimony of the father. Foote and McMillan are both interested witnesses. The testimony of Breithauer is clearly incompetent; and Mollison denies that there were any threats made. It cannot be said that Foote has shown by a preponderance of testimony that he was, or that a man ordinarily alive to his interest would have been, intimidated, and by such intimidation prevented from complying with the law. The testimony, even if held to be competent and free from any objection, only goes to the extent of saying that McMillan had said that he would have a right to shoot; there is nothing in the testimony which says that he would do so.

There are other circumstances which affect the credibility of Foote's testimony. It will be remembered that his structure on the land was about four and one-half or five feet high, without roof, door, window or floor; yet he testified that he took his wife there for the purpose of living therein and that she, after inspecting it, declined to do so; and he seems to wish to have the Department believe that her declination was the

result of her poor health. It is hardly necessary to comment that a robust woman could not have lived in such a dwelling.

The mere fact that McMillan ordered Foote and his son off the land cannot be construed as intimidation. It is a manner of assertion of title and the law will presume that he was a law abiding citizen. He might have had the plaintiff arrested for trespass, but that would not have been intimidation. Admitting for a moment that Foote was intimidated by what he asserts his son told him, he had his remedy in the courts and could have had McMillan bound over to keep the peace which would not have led him into laches which lasted for nearly two years.

For the various reasons given, I am led to hold that the decision appealed from was an error and it is reversed.

MINING CLAIM—SURVEY—END LINE.

BLACK DIAMOND LODE.

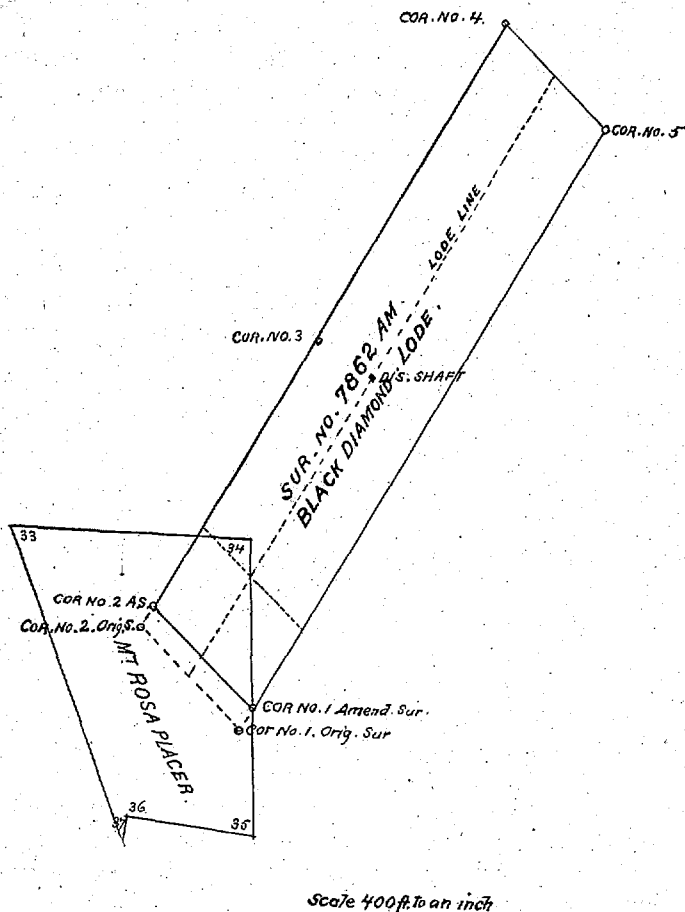
For the purpose of including ground held and claimed under a lode location which was made upon public land, and valid when made, the end line of the survey of said lode claim may be established within the boundaries of a patented placer.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (E. B., Jr.)

The decision of your office of August 10, 1893, required, under paragraphs 50 and 51, Mining Regulations approved December 10, 1891, an amended survey of the Black Diamond lode claim, Pueblo, Colorado, mineral entry No. 299, so that the southerly end line of the survey thereof No. 7,862, should be established no farther into the Mt. Rosa placer as patented April 24, 1893, than was necessary to include said lode to the point where it intersected the easterly line of the said placer. As the said survey then stood both the side lines of the claim entered within the lines of the said placer, the westerly side line over two hundred and twenty feet and the easterly side line over forty two feet.

An amended survey of the claim made in response to the requirement of August 10, 1893, was approved by the surveyor general October 19, 1894, and shows that the southerly end line of the claim is thereby established at the point where its easterly side line meets the easterly side line of the said placer, which point is still considerably to the westward of the point where the lode in its outward course or strike intersects the easterly line of the placer. On November 5, 1894, your office declined to accept the survey as amended and directed that an amended survey be made as required by its decision of August 10, 1893. Thereupon claimant appealed contending that the amended survey approved October 19, 1894, is in conformity with the law and with said paragraphs 50 and 51.

The only question presented, as will thus appear, is whether the southerly end line of the lode claim must be established at the point where the lode intersects the easterly boundary line of the said placer, or may be established at the point where such boundary line is met by the easterly side line of the lode claim. If at the former point the lode claimant must lose a small triangle of ground outside the said placer and included in his application and entry, which may possibly embrace other lodes.



Paragraphs 50 and 51 referred to above are as follows:

50. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with a prior valid lode claim or entry and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it.

51. The end line of his survey should not, therefore, be established beyond such intersection, unless it should be necessary so to do for the purpose of including ground held and claimed under a location which was made upon public land and valid at the time it was made. To include such ground (which may possibly embrace other lodes) the end line of the survey may be established within the conflicting survey, but the line must be so run as not to extend any farther into the conflicting survey than may be necessary to make such end line parallel to the other end line and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting survey and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

The regulations in these paragraphs were approved December 4, 1884, and have been in force ever since. Their phraseology and arrangement were slightly changed by amendment November 7, 1895, but the meaning remained unchanged. Both paragraphs relate to surveys of lode claims, only, where such surveys conflict with each other, and where the ground within the conflict is excluded from the application for patent.

In terms these regulations do not apply and upon their face were evidently not intended to apply to any case of conflict between the surveys of lode and of placer claims. In no case do they relate to a conflict between *claims*, since all ground within the conflicting lines of survey, where these regulations apply is expressly excluded by the application for patent. The reason assigned in paragraph 51 for permitting the establishment of the end line of the survey of a *valid prior claim* beyond the intersection of the lode with the exterior boundary of the excluded ground, is in order that ground held and claimed under a prior valid location, and which may possibly embrace other lodes, may not be lost to the applicant for patent. This reason would seem to apply with equal force whether the other claim was a lode or a placer claim.

It is shown by record evidence that the Black Diamond lode claim was duly located upon the public domain August 20, 1891; and that the Mt. Rosa placer was located September 19, following. The triangle of ground hereinbefore mentioned is within the lines of the lode location and has ever since been held and claimed thereunder. No one is contesting the right of the lode claimant to any portion of this ground. There would seem to be no good reason in view of the foregoing facts, why, by analogy with the practice obtaining in conflicting surveys of lode claims, the claimant should not be permitted to establish his southerly end line at the point shown in his amended survey, in order to embrace the said triangle. The decision of your office herein is accordingly reversed.

FORT SANDERS ABANDONED MILITARY RESERVATION—DESERT ENTRY.

FRANK SIMPSON.

The preference right to make one entry under the existing laws of land formerly embraced in Fort Sanders military reservation, accorded by the proviso to the act of July 10, 1890, is limited to "actual occupants thereon" January 1, 1890, and it therefore follows that the right to make a desert entry under said proviso, can not be exercised by one who was not residing on the land applied for at said date.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (G. C. R.)

Frank Simpson has appealed from your office decision of December 15, 1894, rejecting his final proof, offered January 27, 1894, upon his desert land entry No. 3705, made December 6, 1890, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 32, T. 15 N., R. 73 W., Cheyenne, Wyoming.

The land is within the original Fort Sanders military reservation, which was restored to the public domain by the act approved July 10, 1890 (26 Stat., 227).

The act makes the lands subject to disposal under the homestead law only, with a proviso:

That actual occupants thereon upon the first day of January, eighteen hundred and ninety, if otherwise qualified, shall have the preference right to make one entry, not exceeding one quarter section, under either of the existing land laws, which shall include their respective improvements.

It appears that on October 16, 1894, your office required Simpson to furnish an affidavit, duly corroborated, showing actual occupancy of the land prior to January 1, 1890. This requirement he undertook to meet by filing an affidavit, sworn to before a notary public. This affidavit reads as follows:

I, Frank Simpson, being first duly sworn, say, I am the same person who made desert land entry number 3705, Cheyenne, Wyoming, December 6th, 1890, for the following described lands, to wit:

The east half of the northeast quarter and the north half of the southeast quarter, section thirty two (32), township fifteen (15) north, range seventy three (73) west.

Some time during the year 1888, or prior thereto, I made settlement upon said lands by enclosing the same with a substantial fence about four miles in extent, and by constructing ditches for the irrigation of said lands. I also laid the foundation for a house and brought the materials upon the lands for the purpose of its construction and had partly completed the building when I obtained work on the Union Pacific Railway as a conductor, between Laramie and Rawlins, at which occupation I have been employed ever since.

During the time since my filing on said land, I have raised crops of hay by irrigation, as set forth in my final proof, and have further used the land for pasturing stock. My absence from the same has been made necessary by my employment on the railway, where I have been earning money for my own support and for the improvement of said lands.

Before one has the preference right to make an entry of a quarter

section of these lands, "under either of the existing land laws," it must appear that he is an "actual occupant thereon."

This implies that the applicant must have been a resident on the land January 1, 1890. (See departmental decision in case of Jabez B. and Cairn M. Simpson, dated February 4, 1896.) This is made all the more certain when the general laws relating to desert land entries are considered, and where actual occupation of the land as a resident is not required, while the right of possession is a *sine qua non* to a compliance with the law.

The proviso to the act of July 10, 1890 (*supra*), does not give the preference right to any one to make a desert entry upon the lands in the reservation, but limits that right to one who is an actual occupant upon the land on January 1, 1890. If it were not intended by the act to limit the entries to actual residents upon the land, then the limitation to "actual occupants thereon" would be without significance, for occupation by mere possession without the requirement of actual residence is a right under the general law relating to desert entries. Moreover, the act opening this reservation was not passed until July 10, 1890. Prior to that date there may have been unauthorized occupation of portions of the reservation by non-residents and efforts made to irrigate large tracts. Congress expressly provided that the lands be "made subject to disposal under the homestead law only," with the proviso that "actual occupants thereon" be allowed to make the one entry under either of the existing land laws, which entry "shall include his improvements," plainly meaning that an "actual occupant thereon" must be an actual resident upon the land on January 1, 1890.

But Mr. Simpson swears that he made a settlement upon the lands in 1888 by enclosing the same with a substantial fence, four miles in extent, and by constructing ditches for irrigation. He also partly completed a house on the land when he obtained work on the railroad as a conductor; that he had since that time raised hay on the land and pastured stock; that his absence has been made necessary for his own support and improvement of the land. He thus leaves the inference that his home and residence was on the land January 1, 1890. If that be true, his absence for the purposes mentioned is excusable, and his final proof, if otherwise valid, might be approved.

There appears to be no adverse claim.

I have therefore to direct that you again call on Mr. Simpson to make another sworn statement (duly corroborated), before some officer authorized to administer oaths in these cases, as to whether he was an actual resident upon the land on January 1, 1890. When this affidavit shall have been received, you will pass in judgment upon the whole case as its merits may demand.

The decision appealed from is modified.

SURVEY—CERTIFICATE OF DEPOSIT—ALASKA.

SOUTH OLGA FISHING STATION.

The provisions of section 2403 R. S., as amended by the act of March 3, 1879, with respect to the assignment of certificates of deposit, are not applicable to such certificates issued on deposits for surveys in the Territory of Alaska.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (C. J. W.)

The Arctic Packing Company on October 8th, 1891, deposited one hundred dollars with the Asst. Treasurer of the United States at San Francisco, California, to pay for survey of a tract of public land on the south shore of Olga Bay at the southerly shore of Kodiak Island, Alaska, and \$35, to pay for office work and stationery, and obtained certificate No. 62.

On January 8, 1892, the Arctic Packing Company executed a deed of conveyance to the South Olga Fishing Station,

in and to its lands premises, improvements, plant and other property at and about its fishing station, situated on the southerly shore of Olga Bay near the mouth of Salmon river, which Olga Bay is a tributary to Alitka Bay at the southerly end of Kodiak Island in Alaska, containing about one hundred and sixty acres, more or less. And also all claim, demand, right and title to and in money deposit No. 62, for \$135, made October 8, 1891, by the said party of the first part with the United States Assistant Treasurer at the city of San Francisco.

On November 22, 1893, the South Olga Fishing Station made application to enter and purchase the land known as survey No. 47, covered by its deed from the Arctic Packing Company, and offered said certificate No. 62, in payment.

The register at Sitka, Alaska, refused to accept said certificate. From this decision the company appealed, and on May 2, 1894, your office affirmed the decision of the ex-officio register. From this decision of your office the South Olga Fishing Station again appeals.

Only questions of law are raised by the appeal. The ex-officio register and your office concurred in finding that certificates of deposits for surveys in Alaska are not assignable and as authority for such finding cite section 2403 Revised Statutes, page 441, and paragraph 9, page 3, General Land Office circular (12 L. D., 583).

Section 2403 R. S., is as follows:

Where settlers make deposits in accordance with the provisions of section 2401, the amount so deposited shall go in part payment for their land situated in the townships, the surveying of which is paid for out of such deposits; or the certificates issued for such deposits, may be assigned by endorsement and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise.

Paragraph 9 of the circular above referred to reads as follows:

The provisions of section 2403 of the Revised Statutes as amended by the act of March 3, 1879 (20 Stat., 352), relating to the assignment of certificates by endorse-
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ment, are not applicable to certificates of deposits for surveys in Alaska under said act of March 3, 1891, for the reason that the former statute contemplates the use of the certificates, after assignment, by settlers under the pre-emption and homestead laws of the United States, and not otherwise. Therefore these triplicate certificates can only be used by the respective depositors, in payment for lands in Alaska.

In construing section 2403 R. S., your office held that the public land laws had not been extended over the territory of Alaska, thereby permitting entries under pre-emption and homestead laws, and that said section had no force in said territory. This holding I think is correct and your office decision is approved.

RAILROAD LANDS—ACT OF JANUARY 23, 1896.

LUELLA WASSON.

By the terms of the amendatory act of January 23, 1896, the right of purchase under section 3, act of September 29, 1890, conferred upon persons who settled with intent to buy from the company, is not defeated by the non-contiguity of the tracts applied for.

Secretary Smith to the Commissioner of the General Land Office, March
(J. J. H.) 7, 1896. (W. A. E.)

On March 18, 1893, Luella Wasson made cash entry No. 3525, under the act of September 29, 1890 (26 Stat., 496), for lots 1, 2, 3, and 4, of Sec. 1, T. 2 S., R. 17 E., and cash entry No. 3526 for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 2 S., R. 18 E., The Dalles, Oregon, land district.

As the tracts covered by these two entries were not contiguous, and it appeared that the right to purchase was based solely on settlement, which settlement was made on the land covered by entry No. 3526, your office, by letter of November 12, 1894, held cash entry No. 3525 for cancellation.

From this action claimant has appealed.

It appears from the corroborated affidavit of appellant that she is the widow of James B. Wasson; that in 1885 said James B. Wasson settled upon and took possession of all the land above described with the intention of purchasing the same from the Northern Pacific Railroad Company; that he applied to purchase said lands from said company and received in reply a letter stating that the condition of the grant was so uncertain the company was not in a position or was not willing to make any agreement of sale at that time; that James B. Wasson remained in possession of all of said land up to the time of his death, which occurred January 23, 1888; that since his death appellant has held said tracts in like manner; that both of the tracts have been fenced and all of the land is under cultivation, except about forty-five acres of one tract and ten acres of the other; and that the total value of the improvements is about \$1,000.

On January 23, 1896, an act, amendatory of the act of September 29, 1890, was approved (Public No. 8). The proviso to said amendatory act reads as follows:

Provided, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

This proviso covers the present case, and Luella Wasson must accordingly be allowed to complete the purchase of the two tracts applied for by her.

Your office decision is reversed.

RAILROAD GRANT—CONFLICTING GRANTS—PARTITION OF LANDS.

UNION PACIFIC R. R. Co.

In the partition of lands within the overlapping limits of the grants to the Union Pacific R. R. Co., and the Kansas Pacific Ry. Co., the companies alone were parties thereto, and each must look to its grant within said limits as the source of its title, and not to the award under said partition.

Secretary Smith to the Commissioner of the General Land Office, March 7, 1896. (C. J. W.)

In reference to the application of the Land Commissioner of the Union Pacific Railroad Company, for patent to N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 25, T. 7 S., R. 7 E., Topeka, Kansas, your office reports and finds, under date October 8, 1894, as follows:

Register and Receiver, Topeka, Kansas.

Sirs: On May 27, 1882, the Central Branch, Union Pac. R. R. Co., listed per list No. 18, Concordia office the whole of Sec. 25, Tp. 7 S., R. 7 E., then situated in that district, and all of the section except the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, was patented to the company April 10, 1886, but this tract was omitted from the patent for the reason that at the date of the definite location of the company's road, May 29, 1868, it was embraced in homestead entry No. 2626, made May 28, 1868, by one Frederick Abramson, whose entry was subsequently canceled.

This land falls within the overlapping limits of the grants to this company and the Kansas Pac. Ry. Co., and both were made by the same acts of Congress, viz.: July 1, 1862 (12 Stat., 489), and the amendatory act of July 2, 1864 (13 Stat., 356). The road of the former was definitely located May 29, 1868, of the latter January 11, 1866.

In 1880 the companies agreed to partition the lands lying in the conflicting limits of their grants, and appointed Samuel J. Gilmore to make the division. To the former, he awarded 34,670.89, to the latter, 39,375.53 acres. The award was approved by both companies, on the basis of valuation, and the Kansas Pacific Company relinquished to the Central Branch Union Pac. Co., all claims to the lands allotted by said Gilmore to it (C. B. U. P. Company) in list "B", now on file in this office, and the tract in question is included in said list "B".

Under the law, as construed by the supreme court in the case of Kansas Pac. Ry. Co. v. Dunmeyer (113 U. S., 629), the land was excepted from the grant to the Central Branch U. P. Co., by the entry of Abramson, which was subsisting when the right of that company attached.

Its selection of the tract is therefore held for cancellation, subject to the right of appeal within sixty days.

The land commissioner of the Union Pac. Ry. Co., successor to the Kansas Pacific Ry. Co., now insists that the tract should be patented to that company.

While it is true that the road of that company was definitely located before Abramson made his entry, and the land was not excepted from that grant, it is a fact that the company is only entitled to a moiety of the lands in the overlapping limits, which it received in the award on the partition, in satisfaction of its grant as to that part of it.

Since the company accepted the award, as the result of a voluntary stipulation, and relinquished all claim to the lands awarded to the other company, it cannot now consistently assert any claim to lands which of its own volition, it had waived all right to.

Should this decision become final, the selection of the tract by the company, first named above, will be canceled and the land held subject to entry by the first qualified applicant.

The companies will be notified by this office of this action. Make note hereof on your records.

The Union Pacific R. R. Co. appeals from said decision alleging that it was error under the statement of facts, to hold its selection of the land in question for cancellation and to deny its right to patent for the same as successor to the rights of the Kansas Pacific R. R. Co.

Under their grants, each of the companies named was seized of all the lands within the overlapping limits of its grant, though each was entitled to a moiety only of the lands within such limits. The two companies were alone parties to the partition. The partition was not the source of title as to either, but after partition, each must revert to its grant as the origin and source of title to the land awarded to it. The Union Pacific R. R. Co. would not therefore be entitled to patent for the tract involved which was covered by Abramson's homestead entry at the date of the definite location of the company's road. Your office decision is accordingly approved.

RAILROAD GRANT—LAND EXCEPTED—SETTLEMENT RIGHT.

BOUMHOEFER *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Land embraced within the settlement claim of a qualified pre-emptor at date of definite location is excepted from the grant, even though such claim is never asserted by a filing or entry.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (G. C. R.)

The St. Paul, Minneapolis and Manitoba Railway Company has appealed from your office decision of October 9, 1894, which affirmed the action of the register and receiver recommending that the application of Louise Boumhoefer to make homestead entry of the NE. $\frac{1}{4}$ of Sec. 1, Tp. 130 N., R. 40 W., St. Cloud, Minnesota, be allowed.

It appears that the tract is within the ten-mile (primary) limits of the grant in aid of the St. Vincent extension of the said road, as fixed by the map of definite location filed December 19, 1871, and was listed on account of the grant October 28, 1879, list 6.

It appears also that the tract is within the forty mile indemnity limits of the Northern Pacific Railroad, definitely located November 21, 1871, but outside of the withdrawal on general route. The last named company has, however, made no application to select the tract in dispute, and is therefore not a party to the controversy.

The facts, which are not disputed, are recited in your said office decision, and are as follows:

In the fall of 1870 (prior to the date of definite location of said road, December 19, 1871):

Peter Hanson moved on the tract, built a shanty, broke some land, and continued to live there until May or June, 1877; that the said Hanson, during said period, was qualified to make either a pre-emption or a homestead entry; that when Hanson removed from the land Andrew Nelson moved on, and was succeeded by Franz Anton Boumhoefer; that the present applicant is the widow of the said Boumhoefer and has continued to live upon and cultivate said farm since the death of her husband in 1888; that she has eight children to support, and that her improvements on said tract are valued at \$1500.00.

While not denying that the land was settled upon and occupied by a qualified pre-emptor at the date of definite location, yet the company insists that inasmuch as the settler on the land at date of definite location failed to assert any claim by placing it of record, that the right of pre-emption or homestead did not thereby attach; and that it is not competent for other parties who settled long after definite location to allege and prove that the former occupant had a valid claim, when such claim was never asserted by a filing or entry.

The settlement and residence on the land of Hanson, a qualified pre-emptor, from 1870 to 1877, was the initiation of a right, and that right had attached at the date of definite location. Such being the fact, the land was thereafter excepted from the grant, and the company was entitled to select indemnity therefor under the terms of the granting act. *Northern Pacific R. R. Co. v. Evans*, 7 L. D., 131; *Northern Pacific R. R. Co. v. Bowman*, *idem.*, 238; *Northern Pacific R. R. Co. v. Anrys*, 8 L. D., 362.

The judgment appealed from is affirmed.

AUSTIN v. LUEY ET AL.

Motion for review of departmental decision of December 28, 1895, 21 L. D., 507, denied by Secretary Smith, March 11, 1896.

SCHOOL INDEMNITY SELECTION—MINERAL LANDS.

THE STATE OF CALIFORNIA.

School indemnity selections of land returned as mineral will not be allowed without due compliance with the regulations requiring notice of the application, and affirmative proof as to the character of the land.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (P. J. C.)

It appears that the State of California, on October 23, 1894, offered for filing three indemnity selection lists, numbered 2400, 2403 and 2404, for lands described in townships 6 and 7, ranges 12 and 13 E., Sacramento land district, which were rejected by the local officers, because the lands had been returned as mineral in character. The State appealed, and your office by letter of March 4, 1895, affirmed the action below, whereupon it prosecutes this appeal, alleging that it was error to refuse the indemnity selections; that they should have been allowed and then a hearing ordered to establish their character.

The position assumed by the State is entirely unwarrantable. Amended rule 110 of "United States Mining Laws and Regulations Thereunder," of December 1, 1894, promulgated July 2, 1894 (19 L. D., 5), reads as follows:

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting, is *not* required, notice thereof must first be given by publication for thirty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

This rule was in force at the time the application to make these indemnity selections was presented, and it was incumbent on the State to comply therewith before they could be allowed.

Your office judgment is, therefore, affirmed.

KINSWA v. NORTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of December 4, 1895, 21 L. D., 457, denied by Secretary Smith, March 11, 1896.

APPLICATION TO ENTER—PRIORITY.

CALEB C. WILLIAMSON.

An applicant for the right of entry who, under a rule adopted by the local office, deposits his application and receives a number corresponding to his place in the line of applicants, and thereafter fails to respond to such number when it is reached and called, loses his priority as against a subsequent intervening applicant.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (C. J. W.)

On the 11th of December, 1893, Caleb C. Williamson lodged in the land office at Enid, Oklahoma, an application to enter lots 3 and 4 and the S. $\frac{1}{2}$, NW. $\frac{1}{4}$ of Sec. 2, T. 23 N., R. 7 W., which was permitted by the local officers to facilitate business, said applications to be completed by such applicants responding to their number in line, when it was thereafter called, and paying the filing fees and receiving receiver's duplicate receipt. Williamson failed to respond to his number when his application was reached.

December 15, 1893, Robert H. Stormont made application for same land, and was allowed to make entry.

On the 5th of January, 1894, Williamson sought to complete his application of the 11th of December, which was rejected because of conflict with Stormont's entry.

From this action Williamson appealed and on October 10, 1894, your office affirmed the finding of the local officers. Williamson has appealed from said last named decision. The terms upon which his application was received not having been complied with, Stormont's entry was properly allowed, and if Williamson has settlement rights, his remedy is by contest of Stormont's entry.

Your office decision is affirmed.

WHITE v. DODGE.

Motion for review of departmental decision of December 16, 1895, 21 L. D., 494, denied by Secretary Smith, March 11, 1895.

CONTEST PROCEEDINGS—PRACTICE—COSTS.

HALL v. LAKE.

A contest may be properly dismissed where the contestant declines to pay the cost of taking the testimony on the part of the contestee, and waives the preferred right of entry, and it is apparent that such waiver is not in good faith.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (E. E. W.)

On the 11th of September, 1893, the above named contestee, Bessie J. Lake, made homestead entry of the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 2, and the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 3, T. 16 N., R. 15 W., at Kingfisher, Oklahoma. On the 31st of October, 1893, she was granted leave of absence for one year, alleging in her application that she had made settlement on the 14th of September, 1893, built a house twelve by fourteen feet in size, and resided there ever since; that she had two children, nine and seven years old; that the oldest of these was sick; that because of the great distance to medical aid, and her means being exhausted, she desired leave for the purpose of going where she could get work whereat to make a living for herself and children, and to make money to improve her claim; that she had no team or tools to work with.

On the 12th of September, 1893, the contestant, W. B. Hall, made homestead entry of the NW. $\frac{1}{4}$ sec. 11, T. 16 N., R. 14 W., and on the 11th of January, 1894, in the absence of Mrs. Lake, he filed affidavit of contest against her entry, alleging failure to establish residence, abandonment, that her leave of absence was contrary to law and void; that she was a married woman and not the head of a family, her husband being alive and not divorced, and therefore not qualified to enter; and asking to be allowed to prove his allegations, and to pay the expenses of the hearing. Sometime between that date and the 21st of May, 1893, the day set for the hearing, (the date is not shown with certainty) he applied for leave to change his entry from the land therein described to the land embraced in Mrs. Lake's entry.

At the hearing, after Hall had introduced his testimony Mrs. Lake had a witness sworn in her behalf, and then Hall announced that he waived his preferred right of entry under the contest, and demanded that Mrs. Lake be required to pay the cost of taking and transcribing her part of the testimony, as provided in rule 55 of the Rules of Practice. He also announced his refusal to pay any part of the costs of taking and transcribing Mrs. Lake's testimony, and thereupon she moved to dismiss the contest, which motion the register and receiver sustained. Hall appealed, and on the 30th of October, 1894, the Commissioner of the General Land Office affirmed the action of the register and receiver in dismissing the contest, and also rejected Hall's application to amend or change his entry. Hall then appealed to the Department.

The decision of the Commissioner is correct. Hall's application to enter the land was pending, and it is obvious that he thought it would take precedence in the event of the cancellation of Mrs. Lake's entry, and that his offer to waive his preferred right was but a subterfuge to evade payment of the costs, the condition upon which the law gives him the preferred right to enter.

The decision of the Commissioner of the General Land Office, both as to the dismissal of the contest and rejection of the application to amend the entry, is affirmed.

MCCHRYSTAL ET AL. *v.* EUREKA TOWNSITE.

Motion for review of departmental decision of December 4, 1895, 21 L. D., 478, denied by Secretary Smith, March 11, 1896.

PRACTICE—APPEAL—HEARING.

BOSWELL ET AL. *v.* WATKINS.

The acceptance of an appeal filed out of time, and consideration thereof with other appeals involving the same land, by ordering a hearing to determine the rights of all parties, cures any defect therein, in the absence of objection thereto prior to the hearing so ordered.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (A. E.)

This is an appeal by Boswell and Hance from your office decision of October 18, 1895, allowing the application of Watkins to make homestead entry of the NW. $\frac{1}{4}$ of Sec. 4, Tp. 16 N., R. 2 W., Guthrie, Oklahoma.

Watkins made application on April 27, 1889, Boswell on May 8, 1889, and Hance July 24, 1889. All these applications were rejected because of the pending application of certain townsite settlers for the same land.

Boswell and Hance appealed from the rejection of their applications on May 8, and August 9, respectively, but Watkins did not appeal until September 6, 1889. None of these appeals appear to have been considered by your office, but as the Department on January 13, 1891 (12 L. D., 653), rejected the townsite application, your office, on July 24, 1891, returned the applications of Watkins, Boswell and Hance, and directed that a hearing be had to determine who had the prior right to make entry of the land. In ordering this hearing your office directed that in deciding the question,

You will take into consideration the qualifications of the applicants, the priority and legality of their initial acts, and the efforts made to maintain their respective claims.

At this hearing all parties were represented, and on July 5, 1894, the local office found that Watkins was the first to settle upon the land;

that shortly after filing his application, and after he had followed up his settlement by acts of improvement, he was taken sick and went to Kansas for medical treatment; that while there he received word that his wife was dangerously ill in Michigan, and he went there, but did not arrive until after his wife had died; that he was unable through sickness to return to the land until August, 1889. The office then recommended that the applications of Boswell and Hance be rejected and that of Watkins allowed.

Hance and Boswell appealed, and on April 26, 1895, your office held that Watkins, by his failure to appeal in time from the rejection of his application to enter forfeited whatever rights he had acquired as a settler as against an intervening adverse claim, unless there exists some good reason for his failure to appeal which will excuse him.

Your office then rejected the applications of Boswell and Watkins and allowed that of Hance.

On a motion for review your office, on October 18, 1895, revoked and set aside your decision of April 26, 1895, and allowed the application of Watkins.

From this Hance and Boswell appealed.

When your office accepted the appeal of Watkins, though filed out of time, and considered it upon the same basis as it did the appeals of Hance and Boswell by ordering a hearing, any defect was cured, and it was too late to raise the question after the hearing. Had Hance and Boswell desired to raise the question of error in your office allowing Watkins to be a party to the hearing after his failure to appeal in time, they should have appealed from that ruling, and their neglect so to do precludes them from raising the point after the hearing.

In view of this, the only question which is left to be considered by the Department is that for which the hearing was ordered, to wit, "the priority and legality of their initial acts."

Both the local and your office have found that Watkins was the prior settler, and that fact is not disputed by the other parties to the controversy. The testimony sustaining this finding, your office decree allowing the entry of Watkins is affirmed.

HOMESTEAD ENTRY—MAINTENANCE OF RESIDENCE.

HARY v. GAUMNITZ.

A contract made by a homesteader through which he secures the cultivation of the land by a party who lives on the land with him for such purpose, and is paid for such service out of the crops so raised, is not inconsistent with the maintenance of residence.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (C. J. W.)

May 11, 1889, Fred. Aug. Wilhelm Gaumnitz made homestead entry No. 14,446 for SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ Sec. 10, T. 33 N., R. 30 W., St. Cloud, Min-

nesota. July 10, 1894, he offered final proof and Joseph Hary appeared as protestant. On July 12th, 1894, the local officers approved said final proof, subject to the right of appeal. August 6, 1894, Hary appealed to your office, alleging that the evidence showed that Gaumnitz had not resided continuously on the land for five years, but had been absent from it for more than two years last past.

On November 25, 1894, your office considered said appeal and final proof and rejected the final proof. Pending Hary's appeal Gaumnitz died, and within the time allowed for appeals, Oscar Gaumnitz, as special administrator of said Fred. Aug. Wilhelm Gaumnitz deceased filed his appeal from your office decision.

That the case is one of some doubt, is indicated by the fact that your office and the local officers found differently on the question of the maintenance of residence by the entryman, during the last two years of his entry. After a careful examination of the evidence, I am satisfied that the equities are all with the entryman and that the entry should be sustained and the final proof approved, unless the law clearly demands, a different course. It is clear that the entryman, an old man, and a widower, established his residence upon the land, put all he was worth upon it, in improvements, cleared twenty-five to twenty-eight acres, built a dwelling-house, barn and granary upon it, furnished his house and resided upon the land and cultivated it for three years. These improvements are estimated at not less than four hundred dollars. During the last two years, he is shown to have been unable to cultivate the land himself and he entered into a contract with Joseph Hary, the protestant, in reference to the cultivation of the land, for a period of three years. Under the terms of that contract, the entryman reserved the right to continue his residence on the land, allowing Hary to occupy the building with him, and none of its furniture was removed. The proof shows that he was frequently there during the two years in question, but was absent a good deal of the time under medical treatment in St. Cloud. The terms of the contract between him and Hary seem to have been that Gaumnitz should furnish seed and direct what crops should be planted and that Hary should do all necessary work and receive as compensation one-half of all the crops, to be paid by Gaumnitz on the place. The supreme court of Minnesota, in the case of *A. L. Porter v. Martin S. Chandler*, vol. 27, page 301, held a similar contract to be a contract for hire. If a contract for hire, in contradistinction to one strictly of tenancy, it would not be inconsistent with the maintenance of residence upon the part of the land owner. I find nothing in the proof or conduct of Gaumnitz to indicate any intention upon his part to abandon his home and select another residence and the question is, whether his absence, during his ill health, under the circumstances disclosed by the record may be excused. In my opinion it should be, and your office decision is reversed, and the final proof of Gaumnitz approved.

CONTEST—APPLICATION TO ENTER—DEATH OF CONTESTANT.

WILKA'S HEIRS *v.* MARTIN ET AL.

The right of an actual settler, with a pending application to make homestead entry, who dies before the final determination of a contest instituted by him against a prior adverse entry, descends to his heirs, and may be perfected by them on the cancellation of the entry under attack; and this right is in no manner dependent upon the provisions of the act of July 26, 1892, with respect to the heirs of a contestant.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (I. D.)

The defendants in the case of the Heirs of John H. Wilka *v.* Robert S. Martin and Lillian S. Davis, move for a review of departmental decision of September 5th, 1895 (unreported), wherein their homestead entries were held for cancellation as to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 25, T. 88 N., E. 45 W., Des Moines land district, Iowa.

No point is raised in either motion, that was not made on the appeal and considered in rendering the decision complained of.

This land was included in lands patented to Iowa for the Sioux City and St Paul Railroad Company, but became subject to forfeiture because of the company's failure to construct the road as required, and was by the state reconveyed to the United States and restored to entry September 12, 1887.

In 1883 John H. Wilka settled on the land, and March 29, 1884, applied to make homestead entry for one hundred and sixty acres so settled on, including the tract in controversy.

His application was rejected by the local officers for conflict with said land grant, and he appealed.

Action upon this appeal was suspended June 21, 1884, pending action on the rights of the railroad company for these and other lands, and no action was ever taken on the appeal.

On June 19, 1884, Martin applied to make homestead entry for one hundred and sixty acres including the tract in dispute, which was rejected for the same reason.

Appeal was taken and action thereon suspended as in the Wilka case.

The land was restored to entry September 12, 1887, and on that day Martin filed his application to enter, and on September 13, 1887, Wilka filed his application.

The local officers without a hearing on September 15, 1887, allowed Martin's entry, and rejected Wilka's for the land in controversy.

Wilka appealed from that finding, and asked for a hearing which was ordered.

The evidence on the hearing showed that Wilka was the prior settler on the one hundred and sixty he claimed, including the tract in dispute; that he tried to make entry and upon rejection of his application appealed. He continued to live on the land with his family as a homestead, and the first day after it was open for entry he appeared at the land office to make entry.

Martin was living upon adjoining land and appeared to enter the land he claimed including this tract, the day it was open for entry. The evidence shows that so far as possessory right can give an equity, it was with Wilka. He had lived on the land as his home for four years and showed no laches in appearing to make entry when it could be done legally. The only question left then is whether the heirs of Wilka, he having died December 29, 1890, can complete the entry, after the decision results in favor of the contest he inaugurated.

It is urged that the heirs of Wilka cannot have the benefit of the decedent's contest because it is claimed that the act of Congress of July 26, 1892 (27 Stat., 270) amending Sec. 2, of the act of May 14, 1880 (21 Stat., 180) is "not retroactive and does not give to the heirs of a contestant, who died prior to the passage of the act, the right to maintain the contest."

In the first place it will be noticed that Wilka was not a contestant such as was contemplated in said act of July 26, 1892, but was an actual settler on the land with a pending application to make homestead entry for the land; and under such circumstances upon the death of the successful contestant his heirs had the right to make entry before the passage of the amendment just cited.

That amendment extended the rights of a contestant under a pending contest to the heirs of "any person" who has contested.

A bona fide applicant for land with an application pending at the time of his death, had such a right to enter the land, as descended to the heirs, before that amendment, even when not settlers on the land. *Sharrar v. Teachman* (5 L. D., 422); *Southern Pacific R. R. Co. v. Sturm* (2 L. D., 546).

The circular cited by attorney for Martin (16 L. D., 34), does not apply in this case.

The motion for review is denied.

INDIAN RESERVATION—BOUNDARY LINES—RES JUDICATA.

RED LAKE AND WHITE EARTH INDIAN RESERVATION.

The direction of the Secretary of the Interior that a boundary line of an Indian reservation, as theretofore surveyed, should be retraced and marked on the ground, is a final adjudication as to the correctness of said line that should not be disturbed by his successor in office.

The approved boundary line of an Indian reservation will not, after a lapse of years, be changed, where such action will operate to disturb vested rights acquired in good faith under the previous executive action of the Department.

Where a boundary line of a reservation that has been long accepted by the parties in interest is attacked, and a different line alleged to be the true one, and there is room for doubt, as to which is the true line, the doubt should be resolved in favor of the established line.

Secretary Smith to the Commissioner of the General Land Office, March 13, 1896. (J. I. P.)

On December 27, 1895, you submitted for my approval a letter of instructions to the registers and receivers at Crookston and Duluth,

Minnesota, relative to the disposal of the lands ceded by the Chippewa Indians, which, as a result of the examination of a portion of the land in the Red Lake and White Earth Indian reservation, Minnesota, under the provisions of the act of January 14, 1889 (25 Stat., 642) have been classed as "agricultural" and are therefore subject to disposal under the sixth section of said act. In connection with this matter, you submitted for the consideration of the Department the question as to whether the southern boundary as laid down in the latest township plats shall be considered as the accepted southern boundary of the Red Lake reservation as it existed before the cession under the act of January 14, 1889, *supra*.

I am also in receipt of your office letter of February 18, 1896, in answer to my reference to you of a letter from Mr. M. R. Baldwin, chairman of the Chippewa commission, in regard to the location of the northwest boundary of the Red Lake reservation, for investigation and report thereon, and of your letter of February 19, 1896, transmitting the homestead application of Livingston A. Lydiard for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 7; and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 5 of Sec. 8, T. 148 N., R. 33 W., St. Cloud land district, Minnesota, on appeal from your office from the rejection thereof by the local office at St. Cloud; which tracts are included in the Red Lake reservation, as it is now defined on the township plats.

You also transmitted with your letter of February 19, 1896, notices of twenty-five parties of their desire to enter at the land office, at St. Cloud, certain tracts of land in T. 149 N., R. 32 W., T. 149 N., R. 33 W., T. 150 N., R. 32 W., and T. 151 N., R. 32 W., which they state they are fully qualified to enter, but are prevented from doing so by the fact that said lands are erroneously being treated as within the ceded portion of the Red Lake reservation, which is held to be subject to disposal under the act of January 14, 1889, *supra*.

I gather from your letters of December 27, 1895, and February 18 and 19, 1896, and the accompanying papers, the facts:

By treaty with the Mississippi bands of Chippewa Indians of February 22, 1855 (10 Stat., 1165), these Indians ceded to the United States their right, title and interest in and to all the lands embraced within defined boundaries.

By treaty with the Red Lake and Pembina bands of Chippewa Indians, of October 2, 1863 (13 Stat., 667), the Indians ceded to the United States all their right, title and interest to all the lands embraced within described boundaries.

Under the provisions of the act of January 14, 1889 (25 Stat., 642), the Chippewa Indians in Minnesota ceded to the United States all their lands in Minnesota other than those reserved for the purpose of allotment.

In accordance with the provisions of the sixth section of the act of January 14, 1889, *supra*, for the disposal of the lands, which may be

classed as "agricultural," a portion of the lands in the Red Lake and White Earth reservations are now subject to disposal. But before opening these lands to settlement and entry, it is deemed important to determine the correct boundaries of the ceded lands, and a question has arisen as to the true boundary lines of the reservation.

First: As to the southern boundary.

This boundary is described in the treaty of February 22, 1855, *supra*, as a straight line extending from the northern extremity of Turtle lake to the mouth of Wild Rice river. This line was first surveyed under a contract made February 21, 1872, with Thomas G. Merrill.

On December 2, 1884, the Commissioner of Indian Affairs transmitted to this Department a letter from the Indian agent at the White Earth agency, dated October 6, 1884, in which it was stated that the Indians believed the southern boundary line of said reservation, as established by Merrill, to be erroneous; that it was about two and one half miles too far north. The Commissioner of Indian Affairs, in his letter of transmittal, stated that in his opinion the claim of the Indians was not well founded, and even if it were, he doubted the feasibility of changing the boundary line at that late date; and he further stated that he did not know that the correctness of that line had ever before been questioned, but that he had no doubt that it would be well to have the line re-run and plainly marked in a durable manner. With the correctness of that boundary line thus called in question, and with the matter thus fully before him, the then Secretary of the Interior, under date of January 26, 1885, authorized the Commissioner of the General Land Office to let a contract for the re-survey of the southern and southwestern boundaries of the Red Lake reservation "agreeably to the recommendation of the Indian Office," and under date of June 22, 1885, a contract was let for the re-survey of that line as established by Merrill.

I am of the opinion that this was in effect an adjudication by my predecessor of the correctness of that line and under the decisions of the Department is *res judicata*. *Rancho San Rafael de La Zanja* (4 L. D., 482); *Mansfield v. Northern Pacific R. R. Co.* (3 L. D., 537); *Robert Carrick* (3 L. D., 558); and *State of Oregon* (3 L. D., 595).

In view of the holdings of this Department, as indicated above, and the further fact that the line has been established for more than twenty years, I do not believe that it should now be disturbed but that the final action of the Department with reference thereto of January 26, 1885, should be adhered to in order that administrative action may not become involved in confusion.

You will therefore dispose of the claims which you state have been initiated to some of the lands lying within the lines of this boundary in accordance with this holding.

Second: As to the northwest boundary.

This boundary is described in the second article of the treaty of October 2, 1863, *supra*, as beginning at the point where the interna-

tional boundary between the United States and the British possessions intersects the shore of the Lake of the Woods; thence in a direct line southwestwardly to the head of Thief river; thence down the main channel of said Thief river to its mouth on Red Lake river.

The question as to the correctness of this last boundary was presented by Mr. M. R. Baldwin, Chairman of the Chippewa commission, by letter of February 7, 1896.

It appears that the first survey of this line was made by one Warren Adley, deputy United States surveyor, under a contract dated June 17, 1873. Adley began at the initial point described in the treaty, and closed his survey at the confluence of the north and east branches of Thief river which he designated as the head of that stream. It appears that upon the earlier plats of this survey the stream below the junction was designated as "Thief river" and above the junction as the east branch and north branch, respectively. It appears also that in 1879, one George F. Hamilton, a deputy United States surveyor, when extending surveys over the public lands within the vicinity of this boundary, and when making a re survey of this boundary, crosses the "North Branch" of Thief river several times, always referring to it as the "North Branch," and in his survey of township exteriors and subdivisional lines he refers to the same stream as the "North Branch." It appears also that in the survey of certain townships in April, 1892, the stream theretofore called "North Branch of Thief river" is for the first time designated as Thief river and the lake in which it heads is designated as Thief lake.

The evidence would seem to overwhelmingly establish the fact that at the time Adley made his survey of the northwest boundary line, the head of Thief river was regarded as being at the confluence of the east and north branches of that stream and that the "North Branch" was not designated as the main stream until nearly twenty years after the establishment of the line by Adley, and no reason is given for that designation.

If the head of what was known as the "North Branch" should now be accepted as the head of Thief river and the northwest boundary changed to conform to that view, great confusion would result because of the fact that the public surveys, to a large extent, have been closed in the vicinity of the established line, to conform thereto. Homestead entries have been made and approved upon lands lying within the disputed territory, swamp land and school selections have been made and approved in the same territory; and the effect of changing that boundary line or altering the final action of this Department in approving the line, as established by Adley, would tend to jeopardize and overthrow vested rights acquired in good faith under the executive action of this Department, a thing which this Department has held it would not do. J. C. Lea (10 L. D., 652). See also S. P. Randolph (15 L. D., 433).

I am, therefore, of the opinion that the northwest boundary line, as

established by Adley and approved by the Department, and as recognized by all the parties in interest for more than twenty years, should not now be disturbed.

Third: As to the eastern boundary.

This boundary, as defined by the treaty of February 22, 1855, begins at the mouth of Black river where it empties into Rainey Lake river; thence up Black river to its source; thence in a straight line to the northern extremity of Turtle lake. In 1875 a survey of this line was made beginning at the head of Turtle lake and closing at a point where the surveyor found "water running east into Black river," where he established a terminal point.

The early plats of the township where the survey terminated indicate the stream at that point to be "Black river." The later plats show it to be the south fork of Black river, and a recent survey of some of the townships north show that there is a north or west branch of Black river and the surveyor general expresses the opinion that the head of that branch is the head of Black river, but he gives no reason for his conclusion. The terminal point of the survey made in 1875, at the head of what is now designated as the south fork of Black river, is, in fact, but a little less than one half mile from the head of that fork, but in twenty years a recession of the river or change in it to that extent is not improbable. There is no more or better argument for locating the head of Black river at the beginning of the north fork than there is for locating it at the head of the south fork where it was located more than twenty years ago. At any rate there is room for argument and for reasonable minds to differ on that proposition.

Where a boundary line which has been long established and accepted by the parties in interest as the true line, is attacked, and another and different line is alleged to be the true line, and there is room for doubt as to which is the true line, the rule applicable in such cases is that the doubt should be resolved in favor of the old established line. This is elemental and a reference to authority in support of its soundness will hardly be required.

The question as to the correctness of the east boundary is raised by persons who would like to initiate claims to the lands that would become public lands if the boundary should be changed as suggested. If such a change should occur, approximately 200,000 acres would be taken from the reservation as it now exists, with approximately 25,000,000 feet of valuable pine timber which has been examined and appraised at the expense of the Indians.

I am clearly of the opinion, therefore, in reference to these boundary lines, that they should be adhered to as now indicated upon the maps and plats of your office, except that portion of the east boundary beyond Butler's terminal point, which should be corrected as indicated by your office letter "C" of the 19th ultimo; that to change these boundaries now would be not only a violation of all the precedents established by

this Department in such matters, but would be a violation of vested rights and contrary to public policy.

With your letters submitting the question of these boundaries, you also transmitted the claims of individuals to certain tracts within the boundaries of said reservation, concerning which you have asked me to express an opinion, the same are herewith returned to you for disposal in accordance with this decision.

The question concerning the rights of the State of Minnesota to swamp lands within the lines of this reservation, recently submitted, is now under consideration, and my conclusion with reference thereto will be communicated to you at an early day.

COAL LAND—PURCHASE OF POSSESSORY RIGHT.

SWAIN *v.* KEARNEY.

One who purchases the possessory right to a developed vein of coal, while the title to the land is still in the United States, and thereafter remains in actual possession thereof, is entitled to file a declaratory statement and perfect title thereunder.

Secretary Smith to the Commissioner of the General Land Office, March 13, 1896. (C. J. W.)

On May 24, 1893, Daniel Kearney filed coal declaratory statement, No. 79, for the purchase of the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 12, T. 20 N., R. 14 E., W. M., North Yakima, Washington.

On May 2, 1895, at 9 o'clock, A. M., Carroll O. Swain filed declaratory statement, No. 80.

On May 2, 1895, at 1 o'clock P. M., Mary E. Kearney presented the relinquishment of Daniel Kearney to coal declaratory statement, No. 79, and filed her coal declaratory statement, No. 81, for same land, alleging possession since April 1, 1895.

May 29, 1895, Mary E. Kearney appeared at the local land office, and applied to make final proof and payment for the land; and on that date notice was issued to Carroll O. Swain to appear before the office on July 6, 1895, and show cause, if he could, why the final entry of Mary E. Kearney should not be accepted.

On the 6th of July, 1895, the parties appeared and testimony was taken.

On July 17, 1895, Mary E. Kearney offered her final proof in support of her claim, and on same date Swain filed his protest against acceptance of the same. On the 24th of August, 1895, the register and receiver rendered dissenting opinions, the receiver finding that both declaratory statements 80 and 81 should be canceled, and the register finding that Swain's declaratory statement, No. 80, should be canceled, and recommending that Mary E. Kearney be permitted to complete her entry by payment for the land. From these decisions Swain appealed,

and on October 26, 1895, your office considered the case and affirmed the decision of the register. From this decision Swain appeals.

The specification of errors is as follows:

1. It was error to affirm the decision of the register, dismissing the protest of appellant.
2. It was error not to hold D. S. No. 81, made by Mary E. Kearney, was void, for the reason that she was not in possession of the land at the time the same was made, and had never opened or improved a mine thereon.
3. It was error to cancel D. S. No. 80, made by appellant.

It appears that Michael McColgan, the agent of Mary E. Kearney, made a filing originally for this land, and that during the life of it, he sold his claim to Daniel Kearney for six hundred dollars. After this sale McColgan acted as Daniel Kearney's agent, and held possession for him during the life of his filing, and also did some work on the claim, boring a hole with a diamond drill to the vein of coal. He was also active in efforts to secure cars to remove the coal. There is no question about the land being coal land and having a coal vein open thereon. During the lifetime of Daniel Kearney's filing, Mary E. Kearney purchased his claim and improvements, consisting of the drill hole and work done in the tunnel, giving five hundred dollars therefor. This fact is not controverted. From the time of her purchase and filing McColgan acted as her agent, and continued in possession of the land as such agent. On May 1, 1895, the day before filing her statement, she appears to have gone upon the land and to have examined it in company with McColgan. The discovery of the coal mine was not made by any of the parties to this litigation. McColgan, first as the agent of Daniel Kearney, and later as the agent of Mrs. Kearney, has made improvements of some value and has all the time been endeavoring to arrange with the railroad company for the removal of the coal. Up to the time of Swain's filing he had neither discovered, developed, nor improved any coal vein on the place, but had recognized the validity of Kearney's claim. Both the local officers, as well as your office, concurred in finding that his filing is invalid, and I am of the same opinion. The only real question in the case seems to be the one about which the register and receiver differed; and that is, whether one who purchases a developed vein of coal, while the title is still in the United States, may file declaratory statement and obtain title thereto.

Discovery and improvement of coal mines seems to be the chief purpose of the laws in reference to this subject.

Section 2348, Revised Statutes, reads

Any person or association of persons, severally qualified as above provided, who have opened and improved, or who shall hereafter open and improve any coal mine, or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry.

Section 2351 reads

In case of conflicting claims upon coal lands where the improvements shall be commenced after the third day of March, 1873, priority of possession and improve-

ment, followed by proper filing and continued good faith, shall determine the preference-right to purchase.

In this case the evidence throws doubt and distrust upon all the transactions of Swain in connection with the mine, and if he has any sort of possession of it, it is clearly the possession of a trespasser. The mine is in condition to be worked and operated, lacking only proper accommodation from the railroad company. The evidence shows that those under and through whom Mrs. Kearney derived possession, had been in peaceable possession of the mine for a long time, and that even Swain had recognized their rights to it. The purchase made by Daniel Kearney, as far as the evidence discloses, was in perfect good faith, the subsequent purchase from him by his wife seems to have been open, honest and fair, and I can see no reason why she should not be awarded the preference right to purchase said land.

Your office decision is accordingly approved.

RAILROAD GRANT—LANDS EXCEPTED—DONATION CLAIM.

OREGON AND CALIFORNIA R. R. CO. *v.* KUEBEL.

Land embraced within a notification of a donation claim, at the time when a railroad grant becomes effective, is excepted from the operation of said grant, though claims of such character are not specifically named in the excepting clause of the grant.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (J. A.)

The land involved herein is the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of section 5, T. 15 S., R. 5 W., Roseburg, Oregon, land district.

Said tract is within the limits of the grant made by the act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, and opposite the section of said road that was definitely located March 26, 1870.

Benjamin F. Sanders filed donation notification covering said land November 28, 1855. June 14, 1882, Joseph J. Kuebel made pre-emption cash entry for the land.

December 14, 1894, your office rendered decision herein, holding that Sanders' donation notification excepted the land from the operation of the grant, of July 25, 1866 (14 Stat., 239). The claim of the Oregon and California Railroad Company to the land was therefore rejected with a view to the consideration of the claims under the pre-emption cash entry and the donation notification.

The appeal of the company brings the case before me for consideration.

The appeal assigns error in substance in holding that the exception made in said grant, of lands "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of" includes lands covered by donation notifications.

The fact that donation claims are not specifically mentioned in the excepting clause of said act of July 25, 1866 (14 Stat., 239), can not deprive donation claimants of rights acquired under the donation act of September 27, 1850 (9 Stat., 496). The land was claimed under Sanders' notification at the time of the definite location of the road and is therefore excepted from the operation of the grant. The decision appealed from is accordingly affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. Co. *v.* HOLTZ.

The order of May 28, 1883, waiving specification of loss in support of indemnity selections, was made at a time when the indemnity withdrawals for the benefit of the Northern Pacific were held valid, and that fact must be considered and given effect in determining the scope and purpose of said order, although such withdrawals are now held invalid.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (F. W. C.)

I have considered the appeal by the Northern Pacific R. R. Company from your office decision of November 19, 1894, rejecting its selection covering the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ Sec. 3, T. 133 N., R. 42 W., St. Cloud land district, Minnesota.

This tract is within the indemnity limits of the grant for said company and was included in its lists of selections filed December 29, 1883, and July 16, 1885. Neither of these lists was accompanied by a designation of losses the same not being supplied until April 26, 1892.

On January 12, 1886, Frederick Holtz made homestead entry of this land upon which he made proof and final certificate issued January 15, 1892.

Your office decision holds that the company's selections of December 29, 1883, and June 16, 1885, were not protected by the general order of May 28, 1883 (12 L. D., 196), because said order did not contemplate the selection of lands subject to settlement without designating a basis therefor, but was applicable only to such of the lands as were covered by withdrawal. *John O. Miller v. Northern Pacific R. R. Co.* (11 L. D., 428).

It is contended by the company in its appeal that since the repeated ruling of this Department holding that there was no authority for an indemnity withdrawal on account of the grant for this company, that the decision in the case of *John O. Miller v. The Company, supra*, is without effect since

if there were no legally withdrawn lands, then there were no exceptions to the operation of the Secretary's order of May 28, 1883, and it applies to all the lands in the indemnity limits.

I am unable to agree with this reasoning, for in considering the scope and purpose of the order of 1883, the condition then existing must be taken into consideration. At the time of the issue of this order the indemnity withdrawals made on account of this grant were respected, and although these orders of withdrawal are no longer regarded, yet this in nowise affects the distinction pointed out in the Miller case, *supra*.

The land in question was, both at the dates of the filing of the map of definite location and the withdrawal ordered thereon, embraced in the *prima facie* valid homestead entry of David Deplock, made August 4, 1868, and canceled May 22, 1874. It is clear therefore that if the withdrawal was held to have been valid the same would not embrace the tract in question, and as the distinction made in the Miller case wherein it was held that the order of May 28, 1883, did not contemplate the selection of lands subject to settlement without designating the bases therefor, has since been uniformly followed, I must affirm your office decision and the company's selections covering the land in question will be canceled.

OKLAHOMA LANDS—CHEROKEE OUTLET—SETTLEMENT RIGHTS.

BOWLES *v.* FRAIZER.

Initial acts of settlement are sufficient if of such character as to give notice that the land is claimed under the settlement laws.

The period of inhibition against entering upon lands in the Cherokee Outlet dates from the proclamation of the President announcing the time when said lands would be open to settlement.

During the pendency of a contest initiated by one who claims priority of settlement it is incumbent upon the contestant to maintain his original settlement rights and establish residence on the land.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (C. J. W.)

On September 20, 1893, Eli J. Fraizer made homestead entry No. 177 for NW. $\frac{1}{4}$ Sec. 14, T. 20 N. R., 9 W., Alva, Oklahoma. The land was a part of the Cherokee Outlet which by proclamation of the President of August 19, 1893, was declared open to settlement on September 16, 1893.

On September 23, 1893, Alva M. Bowles filed affidavit of contest against said entry, alleging that he was the first legal settler upon the land. A hearing was ordered and set for the 17th of April, 1894.

On that day both parties appeared and defendant filed an affidavit for continuance on the ground of the absence of two witnesses. Plaintiff admitted that the witnesses would testify as claimed by defendant and the trial proceeded.

Defendant's attorney cross-examined plaintiff's witnesses, and introduced certain letters, through their identification in the testimony, but

when plaintiff rested his case, defendant demurred to the sufficiency of plaintiff's evidence and declined to introduce testimony in his own behalf. On July 7, 1894, the local officers overruled the demurrer, and held that plaintiff had established his priority of right and recommended the cancellation of defendant's entry.

On August 2, 1894, defendant appealed from said decision to your office, assigning various grounds of error. On December 7, 1894, your office considered said case and specification of errors and affirmed the decision of the local officers. On the 9th of February, 1895, defendant filed his appeal from your office decision, in which he specifies six grounds of error. The 3rd, 4th, 5th and 6th grounds embrace all the material questions involved.

The 3rd ground is that it was error to hold that Bowles made any valid settlement on the land in question on September 16, 1893, or prior to the attachment of Fraizer's rights.

4th. It was error to hold that defendant had notice of any valid claim by contestant, to said land.

5th. It was error not to hold that contestant was disqualified from entering the lands in the Cherokee Outlet.

6th. It was error not to hold that contestant, had failed to follow up his alleged settlement, by establishing residence on said land as required by law, especially in view of the fact that he had actual knowledge of defendant's adverse claim.

The 3rd ground alleges the insufficiency of contestant's acts of settlement made on the day of opening and will be first considered. As defendant offered no evidence as to what these acts were, the statements of contestant and his witnesses must be taken as true. These are in substance that about twelve minutes after 12 o'clock noon on the day of opening he reached the land in dispute and immediately set up a stake with a flag on it. That he commenced a well, which was then sunk to a depth of about three feet, that one or more mounds were thrown up near the supposed line and other stakes set along the supposed line. That his wagon was left standing upon the claim. That he and others spent the evening in hunting for and endeavoring to locate the corners and lines. That next morning he had three or four furrows run around about an acre of ground, sufficient to attract the attention of anyone passing near it. The initial acts of settlement are addressed to the purpose of giving notice that the land is taken and claimed. In my opinion these acts were sufficient to accomplish the purpose intended and were of the character used in most instances on the day of opening in Oklahoma. The peculiar circumstances attending settlements hurriedly made are to be taken into account as was held in the case of *Hurt v. Giffin* (17 L. D., 162).

The 4th ground that it was error to hold that defendant had notice of any valid claim by contestant scarcely deserves separate consideration, since the evidence clearly shows that these acts and signs of set-

tlement were pointed out by contestant to defendant on the evening of the opening, when he came upon the land, accompanied by contestant's verbal statement that the claim was his. There can be no question of notice to defendant of contestant's claim.

The 5th ground of error presents the question of soonerism, as applicable to lands in the Cherokee Outlet opened to settlement under the proclamation of the President of date of 19th of August, 1893. It was held in the recent case of *Townsite v. Morgan et al.* (21 L. D., 496) that as to the Cherokee Outlet the inhibited period, dates from the proclamation opening it to settlement. As the evidence does not show the contestant to have been in the Territory after said proclamation, and before the opening, this, under the evidence, disposes of the 5th ground.

The 6th and last ground presents a more serious question and one not so well settled by former adjudications. It in substance charges that contestant has failed to follow up and maintain his initiatory acts of settlement by residence and improvements as required by law, pending his contest. That contestant was bound to maintain his original settlement rights by such acts as would clearly negative the idea of their abandonment is clear and to establish residence upon the land within a reasonable time. It is hardly to be expected that improvements of a very valuable and permanent character will be made while the title is in litigation and doubt, nor does the law, I think, require it. The maintenance of the original settlement followed by residence is sufficient.

The defendant in this case insists that he has the more valuable improvements and that his residence has been longer upon the land. The witnesses, however, estimate the value of the improvements to be about equal. The contestant was delayed in the erection of a building suitable for residence by cutting his foot while working at his improvements, but he seems to have established his residence on the place in December, 1893, about three months from the time of his first acts of settlement. He has preserved his rights and your office decision is approved.

TIMBER CULTURE CONTEST—COMPLIANCE WITH LAW—COSTS.

REYNOLDS v. RAMSDELL.

The arid condition of land embraced within a timber culture entry does not excuse non-compliance with the requirements of the law.

A contestant who attacks a timber culture entry for the purpose of securing a preferred right of entry must pay the costs of such proceeding; and the contestee in such a case should not be required to pay for testimony submitted by him in good faith as a part of his defense.

Secretary Smith to the Commissioner of the Land Office, March 16, 1896.
(C. J. W.)

Edward E. Ramsdell made timber culture entry for SW. $\frac{1}{4}$, Sec. 34, T. 4 N. R. 65 W., Denver, Colorado, March 16, 1885.

On December 28, 1893 Samuel Reynolds filed contest against said entry, alleging that no trees were then growing on the land; that no trees had been planted on it since 1888; that defendant had planted only about four acres of trees and had failed to cultivate and water, or otherwise care for them.

The testimony in the case was taken before the clerk of the district court of Weld County, Colorado, on February 5, 1894. The costs amounting to forty-seven dollars and eighty-five cents were paid by the plaintiff.

On February 26, 1894, plaintiff made a motion to retax the costs and required the defendant to deposit \$32.50, which motion the register and receiver sustained and on the same day made their decision, and the defendant appealed, without mentioning the motion to retax costs, and did not make the deposit as required. By letter "H" of July 30, 1894, your office without passing upon the correctness of the action of the local officers in sustaining said motion, directed that they notify defendant that his appeal would not be considered, unless within thirty days from said notice he paid to the receiver, the sum of \$32.55, to be held by him and await the final determination of the case. The amount was accordingly deposited by the defendant. The motion to retax the cost rests on the theory that defendant, who was the first witness sworn in his own behalf, admitted the truth of the allegations set out in the contest affidavit and that the testimony of the other witnesses was therefore irrelevant. The defendant substantially admitted the truth of the facts charged but set up additional facts by which he sought to avoid the consequence of his failure to plant trees since 1888. The plaintiff it seems did not during the progress of the trial object to paying the costs of transcribing the testimony of any witness, until after the witness had testified, been cross examined and discharged.

On November 23, 1894, your office passed upon defendant's appeal and also considered and passed upon defendant's liability for the costs, to cover which said deposit had been required.

In reference to the matter of costs your office held, that in as much as plaintiff made no objection to paying costs during the pendency of the trial so as to put defendant on notice of what evidence was deemed irrelevant, the motion to retax was improperly allowed, but affirmed the finding of the local officers that the entry should be canceled.

From this decision Ramsdell appeals in so far as said decision holds his entry for cancellation. He bases his appeal upon the ground that during the years 1888 and the date of the contest in December 1893, he was unable to obtain water for irrigating purposes and that he had demonstrated by experience that it was useless to plant trees until he did obtain a supply of water and that he acted in good faith and had finally succeeded in making arrangements for an adequate supply of water. The cessation of all effort to plant and cultivate trees for three or four consecutive years, is fatal to this entry especially since the contest was filed pending the default.

Reynolds also appeals from so much of your office decision as relieves Ramsdell of the costs of the testimony offered by him. I find no authority for the order made, requiring Ramsdell to deposit money to pay the costs, he being the defendant in a contested timber culture entry, where the contestant claims the preference right of entry. The costs in this case should have been taxed under rule 54 of practice. Under rule 41 the local officers are clothed with the power of keeping out of the record obviously irrelevant testimony, that is testimony readily recognized as irrelevant, not alone by the legal, but the common mind.

I know of no rule for taxing costs for obviously irrelevant and clearly useless testimony. The requirement made of Ramsdell to deposit money to pay costs seems to be based on the idea that the testimony by which he supported his defense was obviously irrelevant in the meaning of the rule, and therefore he should pay for it. As to whether it is of this character, is still the subject matter of serious and earnest controversy between learned counsel, carried on, we must suppose with some degree of sincerity. Under these circumstances it is most likely that the defendant acted in perfect good faith, and honestly believed in the sufficiency of his defense and the relevancy of the testimony offered. The result of his mistake, is the cancellation of his entry and the extinguishment of his claim to the land. As his defense appears to have been made in good faith I see no reason why he should be required to pay the costs, and the money deposited with the receiver by him should be returned to him.

Your office decision is approved.

REPAYMENT-DESERT LAND ENTRY-INITIAL PAYMENT.

WILLIAM R. BENTLEY.

There is no authority of law for the repayment of the excess erroneously charged in the initial payment made on a desert land entry.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (W. F. M.)

William R. Bentley has appealed from the decision of your office denying his application for repayment of one half of the initial purchase-money paid on his desert land entry of the NW. $\frac{1}{4}$ of section 24, township 1 N., range 66 W., made on April 1, 1891, at the Denver, Colorado, land office.

It appears that at the time of entry he was wrongfully required to pay fifty cents an acre instead of twenty five cents, and having now relinquished the entry on the ground, as he states, of the impossibility of covering said land with water, he now asks that he be refunded the excess erroneously required of him.

The action of your office is based on the authority of Henry L. Davis, 12 L. D., 632, and George W. Crane, 16 L. D., 170. Under date of February 2, 1892, the registers and receivers of the United States land offices were instructed that in cases where parties had made an initial payment of fifty cents an acre, a balance of seventy five cents should be accepted upon their submitting final proof. The Crane case, *supra*, simply follows those instructions.

In the case now before me, however, the filing of the relinquishment deprives the entryman of the advantage of having his final payment reduced, and he is therefore without remedy unless repayment be allowed. But under the law as heretofore construed by this Department it cannot be allowed. In the case of Frank A. White, 17 L. D., 339, the entryman was required to pay fifty cents an acre at the time of his application and an additional sum of two dollars an acre when he made final proof, and since the entry embraced three hundred and twenty acres, the excess amounted to \$400. It was said that "there is no question but that White was required to pay \$400 too much for his land," but it was held that no legislation on the subject applied to the facts of the case, and White's application for repayment was accordingly denied. See also Stockard W. Coffee, 19 L. D., 580.

The decision of your office is affirmed.

UMATILLA CASH ENTRY—FINAL PROOF—SUCCESSION.

CLARISSE FAUBARE.

The administrator of the estate of a deceased purchaser of Umatilla lands may submit final proof in support of the purchase made by the decedent.

The laws regulating succession under homestead entries are not applicable to Umatilla cash entries. The rights of a deceased entryman, intestate, in the latter case descend to the heirs and are subject to administration according to the laws of the State in which the land is situated.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (W. F. M.)

On April 20, 1891, Michael Le Compte bought at public sale lots 1 and 2 and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 10, township 3 N., range 34 E., La Grande, Oregon, under the act of March 3, 1885 (23 Stat., 340), providing for the sale of Umatilla lands, and paid the first installment of one third of the purchase price on that date. On April 20, 1892, he paid the second installment, and died shortly thereafter, intestate. On January 9, 1893, P. A. Worthington, who, previously, had been appointed and had qualified as administrator of Le Compte's estate, paid the third and last installment and received the final certificate, and on the same day made final proof which was received and approved by the register and receiver.

Le Compte's sole heir is a sister, Mrs. Clarisse Faubare, who resides

at Junction City, Wisconsin, and she has appealed from the decision of your office holding the entry for cancellation on the ground that the final affidavit was improperly made by the administrator instead of by the heir. It is proper to state here that this final action was taken by your office only after the entry had been for a time held in suspension in order to afford the heir opportunity to make the required proof.

The record discloses that there is conflict between the administrator and the heir in this, that the latter desires the title to the land to vest in her disencumbered of the entryman's debts, while the former, who personally advanced the money for the final payment, seeks to have the land pass under his administration and applied to decedent's debts. With that controversy this Department has no concern. The laws of Oregon must control it.

Preliminarily, however, to a final disposition of the case, it may be said that in no event does the authority reside in your office to cancel the entry. As was correctly announced in the case of Charles O. Fanning, 20 L. D., 297,

while you should refuse to issue patent upon a purchase of these lands until satisfactory proof of residence and cultivation, as required, is shown, yet, if the payments are made within the time required, an entry cannot be avoided.

With respect to the principal issue as to whether or not final affidavit may properly be made by the administrator, I have felt no hesitancy in reaching the conclusion that, under the circumstances of this case, it was his duty to do any and all things, including the making of final proof, that he deemed necessary for the protection of the estate committed to his administration. Under the laws of Oregon

the administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed, or the same is surrendered to the heirs by order of the court or the judge thereof. Hill's Annotated Laws, Vol. 1, Sec. 1120.

The right of possession and control carries with it *ex necessitate rei*, the correlative duty of guarding the interests of the estate in whatever manner they may appear. The making of final proof was a necessary and legitimate act of administration which the administrator could not have neglected without a breach of duty.

It was error in the decision appealed from to apply the regulations growing out of the special provisions governing succession under the homestead laws to Umatilla cash entries. The rights of the deceased entryman, intestate, in the latter case, descend to the heirs and are subject to administration, according to the law of the situs of the land. There are no special laws regulating descent in such cases. It follows, therefore, that any controversy that may arise between the administrator, the creditors and the heir, must be determined by the courts of the State of Oregon according to the laws of that State.

The decision of your office is reversed, and it is now ordered that patent issue in the name of Michael Le Compte, the deceased entryman, and that the final certificate be corrected accordingly.

MINING CLAIM—KNOWN LODE WITHIN PLACER.

VALLEY LODE.

After the issuance of a placer patent the Department cannot assume that a known lode existed within the limits of said placer at the date of the application therefor, merely because a conflicting lode location antedates the location of the placer.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (P. J. C.)

The record before me shows that George W. Farlin, on October 24, 1881, made mineral entry No. 710 of the Valley lode, lot No. 216, Helena, Montana, land district.

On February 18, 1891, your office held the entry for cancellation to the extent of its conflict with the patented placer claim, entry No. 575, under the authority of the doctrine announced in Pike's Peak Lode (10 L. D., 200). Service of this decision was made upon Farlin by registered letter February 24, 1891.

No action having been taken by the entryman, your office by letter of December 27, 1894, canceled the entry as to the conflict. The local office was directed to note the same on their records and to

notify the claimant and allow him sixty days in which to apply for an amended survey properly describing the claim after eliminating that part thereof herein canceled. And you will further advise said claimant that in the event of his failure or refusal to apply for the amended survey herein ordered within said period of sixty days, his said entry 710 will, in the absence of appeal, be canceled in its entirety without further notice to him.

In response to this, counsel for the present owner of the claim filed a letter asking that your office judgment be recalled and further action be held in abeyance pending the disposition of a suit pending in court, by which it was stated the conflict would be adjusted. This statement not having been made under oath, and there being no evidence before your office of any transfer of the claim, you denied this request by letter of February 8, 1895, whereupon the Bannister Mining Company prosecute this appeal, assigning numerous grounds of error.

There was also filed in your office, two days after the appeal was presented, an affidavit by one Eli D. Bannister by which it is shown that he purchased of Farlin the Valley lode July 8, 1891; that on December 30, following he transferred it to the Bannister Mining Company; that he is the president of said company; that the company had no notice of the cancellation of the entry.

In my view of this case it is not necessary to discuss the many questions suggested and argued by counsel in his brief. At the time your office promulgated its decisions of July 18, 1891, and December 27, 1894, the doctrine in the Pike's Peak Lode, as reported in 10 L. D., 200 and 14. Id., 47, prevailed in the Department. That case, however,

was overruled by the South Star Lode (20 L. D., 204) and the rule therein announced is (syllabus):

When it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, it must be held that the claim embraced in said lode is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue therefor, if the law has been in other respects fully complied with.

There is no evidence before the Department that a known lode did exist in the ground claimed by the Valley within the limits of mineral entry 575 at the date of the application for patent therefor. The Department cannot assume that a known lode does exist simply because the lode location antedates that of the placer, especially after the placer patent has gone out. The application for the placer patent is not before me, but it will be presumed that the statutory affidavit that there were no known veins or lodes within its area was made and filed.

Your office judgment of December 27, 1894, will therefore be modified to the extent of allowing the present owner of the Valley lode to make an application for a hearing within a reasonable time, to be fixed by your office, with the view of showing that a known lode or vein did exist in the Valley lode claim within the limits of said placer entry 575, at the date of the application for patent by the latter. Upon its failure to do so your said office judgment will be enforced.

It is so ordered.

MINING CLAIM—PROTEST—FINAL JUDGMENT—EQUITABLE ACTION.

OSCAR WALLER ET AL.

In the matter of a protest against a mineral application in which the General Land Office dismisses the protest, but in the same order requires of the mineral applicant republication, the judgment, if allowed to become final, is equally binding upon both parties, and should be so treated on a subsequent application of the mineral claimant for equitable relief.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (P. J. C.)

This controversy involves mineral entry No. 439 for the Waller No. 1 lode claim in Rapid City, South Dakota, land district. By departmental decision of February 23, 1895 (20 L. D. 144) a writ of certiorari was granted and the record transmitted.

It is shown that Oscar Waller made mineral entry No. 439 March 9, 1891. In November following Joseph Snyder filed a protest against the same, alleging (1) false testimony as to the work and improvements on the claim, as to its having been made by applicant or his grantors, (2) fraud in making the entry, in that it was made for the purpose of securing title to a quartz mill and improvements belonging to protestant, (3) that there is no discovery of mineral within the limits of the claim, that it is non-mineral in character.

As a result of the hearing that was ordered, the local officers concluded that the preponderance of the testimony seemed to be in favor of the mineral applicant. From this decision I quote:

The register and receiver do not go beyond the testimony here produced, and yet it is difficult to resist the impression that title is sought not for the mineral that may be in the land but as a convenient site for the reduction works in which Keith is interested, also that the publication of notice, and posting of same were not of that public open character which the law contemplates.

It does not appear that Snyder ever made application to enter his claim as a mill-site during all the years in which no one disputed his title to it and he was out of the country. That he should not become aware of the great value of his claim and dilapidated mill until another man had erected expensive reduction works on it is to say the least suspicious.

They recommended that the protest be dismissed. On appeal your office, by letter of September 12, 1893, affirmed their action on the facts in this language:

The testimony taken at the hearing is voluminous, and upon the question as to the mineral character of the land, and the mining improvements thereon, which you deem the only ones involved in the case, it is conflicting. Upon a careful examination of the testimony, I am unable to discover any principle of construction upon which it may be harmonized: therefore, special consideration must be given to your conclusions as to the facts.

In your said office decision it was further said:

But for the manner of giving notice of the application for patent in the case, which is disclosed by the contestee's *ex parte* evidence, I think his entry might be approved for patenting.

The notice of application for patent in this case was published, as shown by the notice itself, upon the order of the receiver who also designated the newspaper in which the publication was made. At the time this order and designation were made there was no vacancy in the office of register, but that officer was temporarily absent on leave granted by the Honorable Secretary.

It is not claimed, nor is it true, that the receiver had any specific directions from this office to act for the register in this case.

Under the mineral land laws the publication of the notice of application for patent and the designation of the newspaper in which the publication must be made are acts required of the register. These acts are not ministerial in character, and therefore, under the circumstances, the receiver had no authority to publish the notice and designate the newspaper in which it should be published. (1 L. D., 150), (1 L. D., 545) (9 L. D., 41) and (9 L. D., 365).

The receiver's order for the publication of notice in this case, and his designation of the newspaper in which the publication was made being unauthorized by law, it follows that no legal notice of the contestee's application for patent has been given. Therefore the mineral claimant herein will be required to republish a proper notice of his application for patent, under the direction of the *register* for the statutory period. Proper notice must also be posted on the claim and in your office for the same time.

Under the republication and reposting, adverse claims may be filed as in the case of an original publication and posting of the notice.

You will notify all parties in interest hereof, and in due time make report as required by existing regulations.

Both parties have attorneys resident in this city who have been notified of this decision by letters from this office of even date herewith.

Service of this judgment was made on both parties, but neither appealed, therefore your office, by letter of February 14, 1894, notified the local officers that the decision of September 12, 1893, had become final "and the case is hereby closed" but directed that Waller would be allowed sixty days within which to commence the republication and re-posting of notice of his application for patent, and in case of default his entry should be held for cancellation.

On March 17, 1894, the mineral claimant filed a "motion for the reconsideration of the Commissioner's action of February 14, 1894, and for the reference of said entry to the board of equitable adjudication for confirmation." By letter of April 30, 1894, your office denied this motion on the ground (1) that there was no service of the motion on the opposite party, the protestant, (2) because the order of February 14, "is not of such a nature as that a motion for review lies" in that "it neither denies nor abridges a right, neither does it confer or enlarge a right," that it was simply an order closing a case pursuant to a decision which had become final; neither a motion for review or appeal had been filed.

A motion for review of this decision was filed and overruled by your office letter of July 17, 1894, whereupon the mineral claimant presented an appeal to the Department, assigning error as follows:

(1) In entitling his decision, or letter to the local officers passing upon said motion "In re Joseph Snyder v. Oscar Waller."

(2) In holding that by said motion to submit the entry in question to the board of equitable adjudication, the claimants of said entry seek to obtain, contrary to the Rules of Practice, a review of the office decision dated September 12, 1893.

(3) In holding that since the decision of September 12, 1893, was rendered there has been any claim adverse to said mineral entry pending in or before the Land Department or before any branch thereof.

(4) In not finding and holding that said decision of September 12, 1893, disposed of and concluded the only claim adverse to said entry which has at any time been presented to the Land Department.

(5) In not finding and holding that upon the rendition of said decision of September 12, 1893, the question of the proceedings had in the allowance of said mineral entry No. 439 became and remained solely one between the United States and the mineral claimants under said entry.

(6) In not finding and holding that under the facts existing with respect to the publication of notice of the filing of the application for a patent on said Waller No. 1 Lode Claim, the law was substantially complied with, and that under the statute governing the board of equitable adjudication, the claimants of said entry are entitled to the relief which that board is authorized to extend in the matter of suspended entries.

(7) In not granting said motion to submit said entry to the board of equitable adjudication.

This appeal was denied by letter of August 22, 1894, and thereupon a petition for certiorari was presented which resulted in said departmental decision (20 L. D., 144).

It seems to me, notwithstanding the array of errors assigned, that there is but one vital question presented by this record, as it stands,

and that is the effect of the judgment of September 12, 1893. If that judgment is of binding force, then this proceeding is superfluous. It was with the view of determining this matter that the writ of certiorari was granted. It is true that it was said in the opinion granting the writ: "Whether this case is one which can be properly submitted to the board of equitable adjudication will be passed upon when the case is before the Department." But it is also said: "The various questions presented by the record will then be considered."

It is insisted by counsel for the mineral applicant that this judgment is binding on the protestant. There can be no doubt of this proposition. Conceding this, as I do, it is pertinent to inquire why it is not also in full force and effect against the defendant. The judgment was against the contention of the protestant, the land was declared to be mineral in character and it was determined that the required amount had been expended in improvements. But your office went a step further and held that there should be re-publication and re-posting of notices of application for patent, upon grounds therein stated at length. Here was just as positive a demand against the entryman as was that against the protestant. It is admitted that the entryman had notice of this judgment. No appeal or motion for review was filed, and the case was formally closed.

To hold that this judgment is not conclusive is to impeach the integrity of decisions in a sort of a collateral way, when the party attacking had every facility afforded by law and the Rules of Practice to test the question directly, and in a manner where all parties would have been heard on the propositions submitted.

The motive of the mineral claimant in pursuing the course he has is not one to commend itself to candid minds.

As heretofore stated, in considering the petition for certiorari, claimant's reason for not appealing was that he desired your office decision to become final so that he might have the entry referred to the board of equitable adjudication. By this very act, it is not improbable that he may have lulled the protestant into inactivity, because your office judgment requiring re-publication may have been, and probably was, entirely satisfactory to the protestant, for the reason that when this was done he might have the right to attack the application by adverse proceedings and thus have had this controversy settled in court. So there was no incentive, or object to be attained by Snyder in taking an appeal.

Now the defendant, upon whom an obligation was imposed that went to the very foundation of his right to a patent, entirely ignored your judgment, with premeditation allowed it to become final, and now seeks by other and different methods to defeat and ignore a valid and subsisting judgment.

Having the entire record now before me a more extended examination has been made of the facts as above set forth than was possible in

the consideration of the petition for certiorari, and I am now satisfied that the action of your office of February 14, 1894, which is the basis of the present proceeding, should be affirmed.

It is so ordered.

REPAYMENT—REJECTED APPLICATION TO PURCHASE.

WALTER NEWTON.

The payment to the receiver of the purchase price of a tract of land before the local office is ready to act on the application to purchase, makes the receiver the agent of the applicant who must look to such officer for the return of the purchase money, if the application is rejected.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (G. C. R.)

On January 10, 1895, Walter Newton filed in the local land office at Marquette, Michigan, an application for the return of the purchase-money (\$200) alleged to have been paid by him to the late receiver, Thomas D. Meads, on August 10, 1892, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 23, T. 51 N., R. 36 W.

He states in his application, which is sworn to, that he made his final proof under his pre-emption declaratory statement for said land before the probate judge at Houghton, Michigan, on July 26, 1892; that at the time he offered his final proof he also made full payment for said land, in the sum of \$200, which, with the final proof, was deposited with said receiver; that the final proof was suspended by reason of a conflict with the homestead entry of one James P. Clune, to whom the land was afterwards awarded; that he applied for the repayment of said sum, and the present receiver informed him that his predecessor (Meads) never turned the money over to him.

Your office by decision dated January 28, 1895, denied the application, on the grounds that the late receiver failed to make any return or account of the money alleged to have been so paid.

An appeal from that decision brings the case here.

An examination of the records of your office shows that the applicant herein, Newton, offered his declaratory statement for the land May 1, 1889, alleging settlement March 23, of that year; his filing was placed on record November 18, 1891.

On March 28, 1892, James P. Clune made homestead entry for the land, and when Newton, on July 26, 1892, offered his final proof before the judge of the probate court of Houghton county, the same was then and there met by the protest of Clune. The proof and protest were forwarded to the local office and a hearing was ordered. The register and receiver found in favor of Clune on the ground that Newton had failed to show compliance with the law, etc.

On appeal, your office on November 19, 1894, affirmed that judgment.

On January 14, 1895, Newton filed his relinquishment, and his declaratory statement was canceled by your office, March 8, following.

While the failure of the local officers to report proof and payment does not defeat the rights secured by an entry (*Witcher v. Conklin*, 14 L. D., 349), nor the failure of a receiver to account for the money does not defeat the right to patent (*Andrew J. Preston, idem.*, 200), still the payment to the receiver before the local office is ready to act on the application makes the receiver the applicant's agent, and if the application is rejected, the applicant must look to the receiver for the return of the purchase money. *Matthiessen and Ward*, 6 L. D., 713.

In the case at bar the receiver was under no obligation to take the money pending Clune's protest; the entry could not then be allowed, and therefore the money could not be received as in payment for the land.

The existing law (21 Stat., 287,) for the return of purchase moneys refers to entries "erroneously allowed," and it is apparent that the same does not provide for the relief asked by the applicant.

This is not the first instance in which complaints have been made against the late receiver of the Marquette, Michigan, land office, for retaining moneys paid to him to be applied on entries when allowed. In compliance with the recommendation of your office of June 29, 1895, the Department on July 17, 1895, requested the Attorney General to institute a suit on the bond of Mr. Meads for the recovery of \$2,421.56 charged against him "as fees and commissions and as purchase money on application to enter or purchase lands," it appearing that Meads neither returned the money to the applicants nor reported or accounted therefor to your office. It is learned (unofficially) that suit has been instituted against Mr. Meads and his bondsmen; but that the same will not come on for trial before the ensuing May term of the United States Circuit Court.

Mr. Newton should be advised of the pendency of said suit, to enable him, if he so desires, to confer with the district attorney, with a view to amending the pleadings, if need be, to cover his claim.

It would seem, also, that Mr. Meads has subjected himself to the criminal charge of embezzlement; for if it be true that he received these moneys because of his high position as receiver of the land office and thereafter failed to account for them, but appropriated them to his own use, he committed a crime more heinous, if possible, than common larceny, for the crime of retaining moneys was aggravated by the violation of a trust imposed upon him because of his supposed official integrity and honesty.

The decision appealed from is affirmed.

CONTEST—RES JUDICATA—RESERVOIR LANDS.

HILLIARD *v.* LUTZ.

The fact that the Department declines, on motion for rehearing, to remand a case for the submission of testimony on a matter newly alleged as a basis therefor, is no bar to a subsequent contest in which such matter is properly put in issue. One who enters in person, or by agent, during the inhibited period, upon the reservoir lands opened to settlement by the act of June 20, 1890, for the purpose of securing information with respect to said lands, is thereafter disqualified as an entryman.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (W. A. E.)

The tract here involved, viz, the NW. $\frac{1}{4}$ of Sec. 36, T. 36 N., R. 6 E., Wausau, Wisconsin, land district, is a portion of the lands withdrawn for reservoir purposes by executive proclamation of April 5, 1881, and restored to the public domain by act of Congress approved June 20, 1890 (26 Stat., 169), which act took effect December 20, 1890.

November 20, 1894, Jacob Lutz made homestead entry for said tract, and on November 28, 1894, Mary Jane Hilliard filed contest affidavit alleging that said entryman

has wholly adandoned said tract; that he has changed his residence therefrom for more than six months since making said entry by settlement as aforesaid; that said tract is not settled upon and cultivated by said party as required by law; that said Jacob Lutz is disqualified from entering said tract and from holding the same by reason of the fact that he entered upon and occupied the same, and also other water reserve lands on the 19th day of December, 1890, contrary to the inhibitory clause of the act of June 20, 1890, relative to said lands.

When the parties appeared for hearing before the local officers on February 19, 1895, the defendant filed motion to dismiss the contest on the grounds, substantially, that the affidavit alleging abandonment and change of residence was filed before the expiration of six months from date of entry; that the contestant, not having any interest in the land at the time of defendant's settlement and entry, was not competent to raise objections to defendant's qualifications; and that the question of illegal entry upon said water reserve lands by said Lutz had been considered in a former contest between one Louison Hilliard and the present defendant, involving the same tract, and determined by the Secretary of the Interior in favor of said Lutz, and is therefore *res judicata*.

This motion was overruled, testimony was submitted on behalf of each party, and the register and receiver rendered their decision on the merits of the case in favor of the contestant.

On appeal, your office by letter of October 30, 1895, reversed the action of the local officers, sustained defendant's motion and dismissed the contest, whereupon the contestant filed appeal to the Department.

The first question to be considered is, whether or not your office erred in sustaining the motion to dismiss.

Two charges are here made: abandonment, to which the defendant opposes the plea of prematurity; and disqualification, to which *res judicata* is pleaded. (The allegation that the contestant has no interest in the land need not be considered as it is not necessary under the present rules that a contestant should have such interest.) The second charge is logically first in order and will be so treated.

It is obvious that, strictly speaking, any question involved in the present contest is not *res judicata* by reason of having been decided in a former contest to which the contestant herein was not a party, as one of the essential elements of *res judicata*, viz., identity of parties, is wanting. However, the Department in order to prevent useless litigation has adopted the rule that an issue once tried and determined cannot be made the basis of a second contest. If then the question as to whether or not Lutz is disqualified by reason of having entered upon water reserve lands prior to the legal hour of opening has been passed upon in a former contest, that question cannot again be raised; but if it has not heretofore been adjudicated, then it is still a proper subject of investigation.

It appears that on December 20, 1890, the day these lands were opened to settlement and entry, one Lonson Hilliard, the father of the present contestant, made homestead entry at the Wausau land office for Lot 1 of Sec. 35, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 36 N., R. 6 E., thus including in his entry a portion of the tract here involved.

January 7, 1891, Jacob Lutz; January 8, 1891, Edward Houlehan; and January 12, 1891, Phillip Schweitzer, filed applications, respectively, to make homestead entry for the NW. $\frac{1}{4}$ of said section 36, each alleging settlement on December 20, 1890. A hearing was duly ordered and had to determine the respective rights of the several claimants, the sole issue at this hearing being the question of priority. After a consideration of the testimony submitted, the register and receiver found that Lutz, Houlehan, and Schweitzer were equally entitled to the land, their settlements being simultaneous and made prior to Lonson Hilliard's entry.

The entryman, Hilliard, appealed, and on July 2, 1892, your office affirmed the decision of the register and receiver except as to Houlehan, whose claim was rejected. So far, there had been no charge or intimation that Lutz was disqualified, and that question had not been considered.

On August 16, 1892, Lonson Hilliard filed a motion for rehearing on the ground of newly discovered evidence. This newly discovered evidence related principally to the settlements of Lutz and Schweitzer and was therefore merely cumulative, but it was further said in the motion that "it can also be shown that said Lutz was camped on the land in controversy on the 19th day of December at four o'clock P. M." Here, for the first time in the course of the proceedings the disqualification of Lutz was charged. Said motion was denied and the case came to the Department on appeal.

February 12, 1894, the decision of your office in said case was in all respects affirmed. In regard to the allegation in Hilliard's appeal that your office erred in denying his motion for rehearing it was said:

It must appear that the evidence to be offered could not be procured at the trial by reasonable diligence; which is not shown. (279 L. and R., 444.)

April 21, 1894, Lonson Hilliard again filed motion for rehearing, one of the grounds of the motion being the disqualification of Lutz. This motion was denied by the Department on October 10, 1894 (19 L. D., 294), and at that time the following language was used:

As to the second allegation that Lutz is disqualified for having entered upon the lands in controversy prior to December 20, 1890, it appears that one of the grounds upon which Hilliard asked for a new trial before your office was that Lutz was camped on the land on the 19th day of December, 1890, and the very matter was therefore in issue before this Department on February 12, 1894, the day upon which the decision now under review was rendered, and consequently is now *res judicata*.

Following the final decision of the Department in said case, Lutz bought Schweitzer's interest in the tract and made homestead entry on the 20th of November, 1894, as aforesaid.

It must be clear from what has been said above that the question as to whether or not Lutz is disqualified by reason of having entered upon water reserve lands prior to the legal hour of opening is not an "issue once tried and determined." There has never been a trial upon that point prior to the present contest, nor did the Department in the former contest decide that Lutz was not disqualified. The qualifications of Lutz were not in issue in the former contest, and the fact that the Department declined upon good and sufficient grounds to remand the case in order that testimony might be taken upon that point is no bar to a subsequent contest in which that issue is properly raised.

This brings us then to a consideration of the testimony submitted in the present contest upon that question. I can not do better here than quote from the decision of the register and receiver, which clearly and correctly sets forth the evidence on this point.

Jacob Lutz desired to enter the NW. $\frac{1}{4}$ of Sec. 36, T. 36 N., R. 6 E., as a homestead, by settlement thereon at the first moment the lands were thrown open to settlement, and being unacquainted with the land and unable to locate himself, and not being a practical woodsman, he hired one Blodgett, a competent woodsman, who was fairly acquainted with the lands, to put him in a situation or position from which he could make a settlement and claim the land under the homestead law at the earliest opportunity.

Jacob Lutz left the city of Stevens Point, where he resided, on the 18th day of December, and with Blodgett took the Chicago, Milwaukee and St. Paul Railway to come to this land. They left the train in Sec. 26, T. 36 N., R. 6 E., in the afternoon of the 18th day of December, and going east crossed a lake in said Sec. 26, and camped the night from the 18th to the 19th day of December on the SW. $\frac{1}{4}$ of Sec. 26 at the meander post at the lake, or, as Blodgett says, on the beach. On the following day, the 19th day of December, they went to the NW. corner of said Sec. 36 and then Blodgett traced the line from that corner to what he supposed to be the north quarter post, Lutz following him, being careful, as they say, that he, Lutz, should not get on Sec. 36, because it was water reserve land. Having found what

Blodgett supposed to be the quarter post on the north line of Sec. 36, they camped there a very short distance from the north line of Sec. 36, and there Lutz waited until the 19th day of December should expire, when he was then ready to begin his settlement. They had been walking several hours when they first left their camp on Sec. 26, and went in camp again on Sec. 25, although the distance from one camp to another could not have been more than a mile and a quarter.

Blodgett traced the north line from said quarter post of Sec. 36 further east to the NE. corner, and then south from that corner, and then went into Sec. 36, where there is a little railroad bridge or culvert, where, he admits, he met Dawson. Bennet was with him, but Dawson swears there were four in the party that he saw there, and that they then struck off in the woods in Sec. 36. From our view of the case it is immaterial whether there were four in the party of Blodgett, including Lutz, or whether Blodgett was there alone with Bennet.

The plats of this office show that all of Sec. 26 in T. 36 N., R. 6 E., except the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and all of Sec. 36 and lot one in Sec. 35, T. 36 N., R. 6 E., are lands which were restored to the public domain by act of Congress approved June 20, 1890, and to which the inhibition to enter and occupy extends, and these lands having been entered and occupied on the 18th day of December, 1890, and Blodgett having for and on behalf of Jacob Lutz on the 19th day of December, run the line from the NW. corner of Sec. 36 to what he supposed to be the quarter post on the north line of said section, and Jacob Lutz having been with him during this time and confessedly so, with the intent and purpose of settling at the earliest time when said reserve lands became subject to settlement, we are of the opinion that by his entry and occupation of said water reserve lands on the 18th and 19th days of December with an intention and purpose of settlement, Jacob Lutz became disqualified from entering the tract in controversy.

It appears from the admissions of Lutz and Blodgett (to say nothing of the other testimony in the case): first, that Lutz himself crossed water reserve lands on the 18th and 19th days of December, 1890, though he did not go on the tract here involved until the 20th; and, second, that Blodgett, as the agent of Lutz, run the north line of the tract in controversy on December 19, and afterwards, on the same day, went across section 36 to see who was on there. Under this showing Lutz was clearly disqualified. *Keyes v. McGinley*, 18 L. D., 550; *Blanchard v. White et al.*, 13 L. D., 66.

This conclusion renders it unnecessary to discuss the other questions raised in this contest, viz., whether, as Lutz claimed through settlement, it was necessary for him to maintain residence prior to the allowance of his application, and whether contest would lie for failure in this respect before the expiration of six months from date of entry.

Your office decision is hereby reversed, and Lutz's entry will be canceled.

FINAL PROOF—AMENDED RULE 53—ALIENATION.

BASHFORD *v.* CLARK *et al.*

Final proof submitted during the pendency of a contest, and prior to the amendment of Rule 53 of Practice, may be considered under said amended rule, where due notice of intention to submit said proof is given.

An offer to sell, made by a homesteader after the expiration of the statutory period of residence, and the submission of final proof, but pending the allowance thereof, is not inconsistent with good faith on the part of the entryman.

Secretary Smith to the Commissioner of the General Land Office, March 16, 1896. (C. J. W.)

April 24, 1889, Miles C. D'Arcy filed declaratory statement No. 13942 for SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 28, T. 22 N., R. 1 E.

June 13, 1885 Ambrose H. Clark made homestead entry No. 7499 for N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 28 and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lot 4 Sec. 27, said township and range. By letter "C" of February 20, 1890, said entry was amended so as to read NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and lot 1 Sec. 28, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lot 4 Sec. 27, said township and range.

December 6, 1889, Maria D'Arcy (widow of Miles C. D'Arcy) made proof; and, upon protest of Clark and hearing had thereon, decision was rendered by your office May 13, 1892, in favor of the pre-emption claim of D'Arcy. On appeal to the Department, on January 10, 1894, said decision was affirmed, and the case was closed by letter of June 15, 1894, Mrs. D'Arcy being allowed sixty days within which to perfect her husband's claim.

It was also stated that when payment was made and duly reported to your office, Clark's entry would be canceled as to the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, or lot 1, Sec. 28.

October 20, 1894, the local officers reported that after receipt of their notice of June 25th, 1894, Mrs. D'Arcy had taken no action.

October 23, 1894, the local officers transmitted the homestead application of Herbert Bashford of date September 10, 1894, describing SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, or lot 1, Sec. 28, rejected September 12, 1894, because it was involved in the contest between D'Arcy and Clark.

October 19, 1894, Bashford appealed from this decision to your office.

On November 9, 1894, the local officers reported to your office that Clark had on August 7, 1894, made final homestead proof and at same time made tender of the amount due, and the said officers asked for instructions as to Clark's right to lot 1.

On December 1, 1894, your office considering the appeal of Bashford, passed on said case, and held that Mrs. D'Arcy having failed to tender payment for the claim of her deceased husband within the period granted by your office, her application to complete title and her proof must be rejected, and that Clark's entry be left intact, and further, that Clark's final proof, although made pending the contest was not pre-

cluded from consideration, since said contest was finally disposed of, and that Clark's entry being thus intact, the application of Bashford to make entry was rejected.

From this decision Bashford appeals. As Mrs. D'Arcy has not appealed, the decision has become final as to her.

The only ground of error in appellant's specification, demanding special consideration, is the charge that Clark is estopped from objecting to Bashford's application to enter the land in dispute by reason of his having encouraged Bashford to make the application and because of his having proposed to sell out to him. In support of these allegations, affidavits of Bashford and his wife and of his attorney are appended to the appeal. The facts set up in the affidavits by way of estoppel against Clark occurred some three or four years after Clark's final proof was made, and at a time when Clark, as he alleges, might have lawfully negotiated concerning the sale of any right predicated on or accruing under his final proof and tender. A homestead claimant, having submitted final proof showing full compliance with the law, secures thereby the equitable title to the lands, and delay in issuance of final certificate will not affect his rights. *Strain v. Hostotlas* (17 L. D., 293).

Clark's final proof is not before me, but I apprehend that it would not show compliance with the law in the meaning of the case above quoted. His tender of the amount due at the time his final proof was made, was without effect, since the amendment to Rule 53 (14 L. D., 250) under which alone his final proof made pending the contest could be considered expressly excepts the right "to pay the purchase money or commissions, as the case may be," and if he had no right to make such payment, it follows that the offer to do so was of no effect.

It will depend upon certain facts not affirmatively shown and only presumably true, whether Clark's final proof taken pending the contest between him and D'Arcy can be considered, under amended Rule 53. The final proof in question was made August 7, 1890, and Rule 53 was amended March 15, 1892, and, of course, was not operative at the time said final proof was made. It has been held, however, that said amended rule was applicable to cases where the final proof was made before the rule was amended; as between the entryman and parties having notice of the intention of the entryman to offer final proof at the time it was offered, and who had thus an opportunity to protest, if they desired to do so. If there was no irregularity as to giving public notice of his intention to offer final proof upon the part of Clark, and such notice was given so as to bind Bashford who at that time had no connection with the land, or the litigation concerning it, it would seem that Clark's final proof, though irregularly made, might be considered under amended rule 53. *Smith v. Chapin* (14 L. D., 411); *Akers v. Ruud* (16 L. D., 56).

As Clark's final proof has not yet been accepted, it will be considered under Rule 53 as amended, only in the event the law as to notice was complied with as above indicated, otherwise new proof will be required.

I am of opinion that the appellant alleges no fact which affects the validity of Clark's entry, made as to lot 1 in February, 1890. A mere offer to sell not consummated, and made after the expiration of the statutory period of residence necessary to perfect a homestead claim, and after the submission of final proof, but while it was yet pending (as was true in this case), is not inconsistent with good faith upon the part of the entryman, and will not justify the cancellation of his entry. The land in controversy is embraced in Clark's entry, and the entry being apparently valid and uncanceled, Bashford's application to enter was properly rejected.

Your office decision is, therefore, approved.

ALASKA—LANDS OF THE GRECO-RUSSIAN CHURCH.

INSTRUCTIONS.

While Congress has made no provision for determining the extent of the claims of the Greco-Russian Church in Alaska, or the validity of its title thereto, yet the possessory claims of said church have been protected in executive action taken by the State, War, and Treasury Departments, and allowed to remain in the hands of the church; but, in the absence of statutory authority therefor, the Interior Department can not undertake to identify, by survey, the lands of the church, and determine the title of the church thereto.

If any of the property held by the church has been included within the limits of an executive reservation, the President has the authority to modify the order therefor, so as to exclude the lands erroneously embraced within such reservation.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1896. (A. E.)

On December 20, 1894, the Department received a letter from Nicholas, Bishop of the Greco-Russian Church, of Alaska and Aleutian Islands, stating that certain land belonging to the Orthodox Church in Sitka, Alaska, had been taken from said church, and requesting that the Department give orders:

First. To have the lands unlawfully taken returned to the orthodox parish in Sitka.

Second. To have a survey made of all the church lands in Alaska, and,

Third. To affirm the right of ownership of the parishes to their lands in the same manner as it was given them by the Russian government at the time Alaska was transferred to the American government.

This paper was sent to your office with instructions to investigate the matter and make a report. The Department is now in receipt of your office letter of September 14, 1895, transmitting a report by Inspector Swineford on the result of his investigation.

It would appear from the report that the land claimed by the church is now included within reservations for the use of the United States.

The church claims by virtue of a sentence in the second article of the treaty with Russia, concluded March 20, 1867, concerning the cession of Alaska. This sentence is as follows:

It is however understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the Territory, as may choose to worship therein.

An examination of the records relating to the Territory of Alaska and the establishment therein of the Greco-Russian Church has been made, and this shows the following:

The title of Russia to the territory of Alaska was obtained by the discovery and exploration of Bering, a Russian subject, in 1741.

In 1795 the "Holy Orthodox, Catholic, Apostolic, Oriental Church," established a chapel at St. Pauls. In 1799 Emperor Paul VIII granted the entire territory to the Russian American Company, which grant was renewed in 1821, and again in 1841, the last charter expiring January 1, 1862.

These charters gave the Russian American Company the monopoly of the trade and proceeds from the natural resources of the territory, and likewise empowered it to administer the government as it might see fit. Again, while the company could sublet and transfer its privileges and did so, it had no right of private property, but only the right of occupancy. Its right to the sources of wealth, both animate and inanimate, did not carry with it the fee to the soil.

During its occupancy of sixty-two years it established forty stations within the territory.

In 1817 the company erected the first church building at Sitka for the Greco-Russian Church; St. Peters Church on St. Pauls Island in 1819; another church at St. George in 1833; at Unalaska in 1826, and at Oumnak the same year. Churches and schools were also established at other points in the territory.

In the charter of 1821 to the Russian American Company a clause provided that said company should support the churches of the Oriental Church. In 1861 the United States began negotiations with the Russian Government for the purchase of the Russian possessions in America. While this purchase had been discussed in Washington as early as 1859, the negotiations were hastened by the fact that the Russian American Company's charter was to soon expire, and for the further reason that the Hudson Bay Company of London, England, which had a lease on a portion of the Russian territory from the Russian American Company was negotiating to get a charter which would enable it to obtain skins from animals which existed in that locality. At this time the Hudson Bay Company had a lease which ran until June, 1868.

On March 30, 1867, the treaty of cession was concluded. On May 28, 1867, it was ratified, and on June 20, 1867, exchanged and proclaimed.

Article II provided:

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein.

* * * * *

Article VI provided:

The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

The above last mentioned provision in the 6th article was inserted in the treaty in consideration of two hundred thousand dollars being added to the original purchase price.

On August 7, 1867, Brigadier-General Lovell H. Rousseau was appointed by the President of the United States a commissioner on behalf of this government to receive the Territory from a similar officer appointed on behalf of the Russian government. In the letter of instructions to General Rousseau, the Secretary of State William H. Seward said:

In accordance with the stipulations of the treaty, the churches and chapels in the ceded Territory will continue to be the property of the members of the Greco-Russian Church. Any houses and lots which may have been granted to those churches will also remain their property.

"The stipulations of the treaty" referred to by Mr. Seward are found in Article II of that instrument (15 Stat., 539). It reads as follows:

It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein.

The transfer of the Territory was duly made and completed on October 26, 1867, General Rousseau representing the United States government and Alexis Pestchouroff being the commissioner for Russia. In the article of transfer or protocol it is stated by the commissioners that:

We left, as instructed, in the hands of the Greco-Russian Church, the church buildings, appurtenances, and parsonages to the same belonging, as shown and described in inventory marked "B," attached thereto as part hereof.

The inventory "B," referred to by the commissioners in the protocol of transfer, is as follows:

The Cathedral Church of St. Michael, built of timber, situated in the center of the city.

The Church of Resurrection, of timber, commonly called the Kaloshian church, situated near the battery number 2, at the palisade separating the city from the Indian village.

102. A double-storied timber building for bishop house, with outbuildings, appurtenances, and grounds.

35. A timber house for church warden.

98. A timber house for the deacon.

104 } Three timber houses, with their appurtenances and outbuildings for lodging
105 } of priests.
114 }

F }
G } Four lots of ground belonging to the parsonages.
H }
I }

a The place commemorative of the old church.

b A tomb.

Three cemeteries, two outside palisades, and one by the Church of the Resurrection.

On December 1, 1867, under the title of General Orders No. 6, Headquarters Military District of Alaska, New Archangel, Alaska Territory, Samuel H. Kinney, 1st Lieutenant 2d Artillery, by command of Brevet Major General Davis, announced that until such time as the government of the United States should decide what locations and amount of land might be required for government and territorial purposes, certain reserves were made which were duly set forth in said Orders No. 6. In the second order it was announced:

All the land bounded by the above described lines on the one side, and the channel of the bay on the other, shall be held and used as a military reserve, except such land as has been turned over to the Greco-Russian Church by the commissioners of transfer. A map of this reserve will be kept in this office, subject to the inspection of all interested.

"The above described lines" were as follows:

Commencing at a point midway between houses Nos. 25 and 27, and running thence in a direct line, in a southeasterly direction, to the channel of the bay, and in a direct line, in an opposite direction, to a point midway between the southeast corner of the "Public Garden" and the northeast corner of the large building known as the unfinished Barracks; from thence, in a straight line, at right angles to the first line until it intersects a line running at right angles to it, and drawn through the northwest corner of the "Public Garden," and along this latter line to the northwest corner of the "Public Garden;" from thence in a direct line to the outside corner of block house No. 3 or battery D; thence in a direct line to the outside corner of block house No. 2 or battery C; from thence in a direct line to the point where the palisades meet the bay, and along the line of the palisades to the channel of the bay.

On February 26, 1869, E. D. Townsend, Assistant Adjutant-General, United States Army, wrote to the Commanding General of the Department of Alaska, stating that the Secretary of War directed that he take possession of and retain in his charge all posts, buildings, etc., which were not in fact entitled to be considered individual property. In reply to this, the commanding officer, Jefferson C. Davis, made a report to the Secretary of War, stating in detail the buildings, etc., which he took possession of in accordance with the instructions of February 26, 1869, above mentioned. In this report, which is dated at Sitka, December 1, 1869, the commanding officer says:

By referring to the protocol of transfer, executed by the Commissioners, General

L. H. Rousseau and Captain Alexis Pestchouroff, at New Archangel (Sitka), October 26, 1867, and the accompanying inventory "A," it will be seen what kind and amount of property was turned over to the United States in the town of New Archangel.

By referring to the same document, and accompanying inventory "B," it will be seen what property was indicated as belonging to the Greco-Russian Church in the town of New Archangel (Sitka). As there seem to be no questions raised about the property borne on these inventories being in the possession of its rightful owners, it will be passed over.

Secretary of the Treasury Hugh McCulloch, writing to the Collector of Customs at Sitka, in February, 1869, referred to the 2d article of the treaty of cession, and said:

That article includes in the cession "all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which were not private individual property—"*précis individuelle*." The word "public" as used in this sentence, applies only to the word "buildings" standing in immediate juxtaposition; all fortifications and barracks are ceded, and all buildings of any kind in the Territory also become the property of the United States, except those belonging to individuals. The buildings owned by the Russian Fur Company were not individual property, and were therefore included in the cession. This is, in the estimation of this Department, the plain import of this language, even in the absence of any light derived from the context or from attending circumstances. But the treaty goes on to provide that the churches built by the Russian Government shall not become the property of the United States; now the Department is informed that all the churches in the Territory were built and owned by the said Fur Company. Such being the case, if a specific saving clause was necessary to prevent the acquisition of them by the United States under the treaty, it follows that all the buildings owned by that company, not thus specially excepted, are covered by the cession and become the property of the United States.

General Davis further shows in his report that buildings at Kodiak and Ounalaska were turned over to the Greco-Russian Church. Regarding the islands of St. Paul and St. George the report of General Davis does not show whether the church had or received any property there, but on March 3, 1869, Congress passed a resolution declaring those islands to be a special reservation for government purposes, and directing the summary removal of all persons found thereon without authority from the Secretary of the Treasury. This was to protect the fur seal in Alaska.

On May 7, 1869, Captain C. W. Raymond, of the United States Engineers, was given authority to take possession of buildings at St. Michaels. In this authority Lieut. Samuel B. McIntire, 2d Artillery U. S. A., notified him that "all church property belongs to the members of the Greek Church resident there."

In "a recapitulation of the whole business of the transfer of the property," in Alaska, General Davis says:

The members of the Greek Church have received the full amount of property secured to them by the most liberal interpretation of the treaty.

This "property" thus given to the Greek Church General Davis recommended should be confirmed unto it by the proper authority.

By the act of May 17, 1884 (23 Stat., 24), being "An act providing a

civil government for Alaska," it is provided in section 8, among other things:

That the Indians or other persons in said district shall not be disturbed in the possession of any land actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

On May 13, 1889, the United States Court of Claims, in the case of *Kinhead et al. v. United States*, which was a suit brought by authority of Congress to recover certain buildings in the Territory of Alaska, and to which the United States laid claim by virtue of the cession of that Territory, held that the Russian-American Company, under whom Kinhead claimed, had but a right of occupancy in the Territory for the purposes of trade, and at best was but a tenant at will. That all buildings which said company placed upon the land became part of the realty, and its ownership and occupancy of them ceased with the termination of its tenancy.

Continuing, the court said, speaking of the sixth article of the treaty:

Its language is positive, clear and unmistakable. All incumbrances, whether originating in grant, privilege, or possession, in favor of these companies are entirely extinguished. Under that article these companies can no more claim buildings put upon the land for the purpose of carrying on trade during their tenancy than they can the land itself.

On April 2, 1890, in response to the suggestion of the Secretary of the Interior, Lyman E. Knapp, governor of Alaska, transmitted a communication regarding proposed reservations of land in the Territory of Alaska for public purposes. In this communication the governor stated that he had appointed gentlemen at Sitka, Juneau, and Fort Wrangell as commissioners, to make suggestions as to the land which should be reserved. With this letter the governor transmitted the reports of the commissioners.

On June 19, 1890, the Secretary of the Interior transmitted to the President of the United States the communication of the governor of Alaska and the reports of the commissioners appointed by him as last above mentioned. In the letter of transmittal the Secretary recommended that certain described tracts of land be reserved from settlement and disposal, and set apart for purposes mentioned. Before approving the recommendation of the Secretary, the President requested that he be informed under what statute it was proposed to make said reservation. This request was referred to the office of the Assistant Attorney General for the Interior Department. That officer while giving it as his opinion that the President had the authority to make the reservations, admitted that there was no statute giving him express authority to reserve lands. The President, on June 21, 1890, formally reserved such lands as the Secretary had recommended.

On February 27, 1891, the Secretary of the Interior, complying with the request of the Secretary of the Treasury, recommended to the

President that a reservation be declared of land at Illiuliuk harbor, Unalaska, Territory of Alaska, as a site for a depot for coal and supplies for vessels of the United States Revenue Marine Service, cruising in Alaskan waters. This recommendation of the Secretary was approved by the President on March 4, 1891, "until otherwise directed by Congress."

In the act of May 17, 1884, providing a civil government for Alaska (23 Stat., 24), Congress refers to the acquisition of title to occupied lands, but states that the determination of the same "is reserved for future legislation."

Nevertheless, while Congress has made no provision for determining the extent of the claims of this church, nor the validity of its title, the War, State, and Treasury Departments appear to have always protected, by virtue of the second article of the treaty, the possessory claims of the Greco-Russian Church and private individuals holding from Russia, and distinguished them from those held by purchase from the Russian-American Company.

In other words, the claims of the church were treated as those of private individuals were, and the property of neither was ever delivered to the representative of the United States, but allowed to remain in the hands of those who possessed it.

The Greco-Russian Church requests the Department:

1. To have the lands unlawfully taken returned to the orthodox parish in Sitka.

2. To have a survey made of all the church lands in Alaska.

3. To affirm the right of ownership of the parishes to their lands in the same manner as it was given them by the Russian government at the time Alaska was transferred to the American government.

In reply to the second and third requests, it can only be said that Congress has not provided any method by which the extent or title of these claims can be determined, and until then, this Department can not pass upon them.

As to the inclusion of any church property within the limits of an executive reservation, it is quite clear that the President has the authority to modify any order reserving land by reducing the limits of the reservation so as to exclude that erroneously included. See opinion of Assistant Attorney-General Hall, dated February 27, 1896.

In view of this, a copy of this letter and the opinion of the Assistant Attorney-General for this Department, above cited, has this day been sent to the Secretary of State for his consideration, and you will so inform the Bishop of the Greco-Russian Church.

The papers in the case are herewith returned, to be filed in your office.

REPAYMENT—TIMBER LAND ENTRY.

E. C. MASTEN.

An entry under the act of June 3, 1878, of land subsequently found fit for cultivation on the removal of the timber, and canceled for such reason, will not, in view of the later construction of said act, be held fraudulent in character, on application for repayment, where it appears to have been made with no intention of fraud on the part of the entryman.

The failure of a timber land applicant to personally inspect the tract prior to his application therefor, cannot be regarded as evidence of bad faith, where, under the regulations then existing, the applicant was not required to make a sworn statement that he had so examined the land.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 24, 1896. (C. J. G.)

The record in this case shows that on August 16, 1883, E. C. Masten made timber land entry for the SW. $\frac{1}{4}$ of Sec. 32, T. 6 N., R. 3 W., Oregon city land district, Oregon.

Upon the report of a special agent, a hearing was ordered by your office in said case for July 6, 1885. On that date the special agent appeared with special counsel and witnesses for the government, and Masten appeared in his own behalf.

Under date of September 10, 1886, your office rendered the following decision:

Masten testified that he had never seen the land; that he had never seen his witnesses to the final proof, their testimony being procured by one Dr. E. A. Jones; that he was never a member of an organization known as the Columbia Flume and Lumber Company, and that he is still the owner of the land.

The testimony for the government shows that Masten's final proof witnesses did not know the character of the land by legal subdivisions, but only the general character of the township, and that the land, when cleared of its timber, would be fit for agricultural purposes.

From the testimony presented it appears that the land is not such as is subject to entry under the act of June 3, 1878, and the entry is accordingly held for cancellation.

By letter of December 24, 1886, upon Masten's failure to appeal from your said decision, you canceled his entry.

Masten thereupon made application for repayment of his purchase money, and by letter of March 8, 1887, your office denied the same because the entry was canceled as being fraudulent.

On July 26, 1894, Masten again made application for repayment, which was denied by your office August 31, 1894, for the reason that your office decision of March 8, 1887, *supra*, had become final, no appeal having been taken therefrom.

On October 24, 1894, Masten made application for *certiorari*, and by letter of February 23, 1895, you were directed to transmit the papers in the case to this Department.

Masten states, under oath, that his timber land entry "was canceled for the reason that, although the land is heavily timbered, yet when cleared of its timber" it "could be made fit for agricultural purposes."

From an examination of the record before me I am of the opinion that, in so far as your office decision was based on said allegation, Masten's entry was improperly canceled. The local officers stated that at the time Masten made his entry it was generally believed throughout that part of the country that land of the character in contest was of the kind subject to sale under said act. They were also of the opinion that Masten entered this land without any intention of fraud; but in view of the decisions prevailing at that time in regard to such lands, they were of the opinion that said entry should be canceled. The most that can be said, as was said in the case of Ellen Malarkey, directed to be sent to this Department at the same time, is that Masten was only guilty of an error of judgment; but no fraudulent intention on his part can be imputed. This view of the case will be more clearly apparent by reference to the recent case of Robert v. Brownell (18 L. D., 216), where it is said that:

Public lands valuable chiefly for timber, but unfit for cultivation within the meaning of the timber and stone act, include lands covered with timber, but which may be made fit for cultivation by removing the timber and working the lands.

Following in the line of this decision it cannot be charged that Masten swore falsely when he took oath that said land is unfit for cultivation, and valuable chiefly for its timber. Therefore the entry was erroneously canceled on that allegation.

It is furthermore alleged in your office decision that Masten never saw the land in controversy. He made his entry August 16, 1883. It was not until May 21, 1887 (6 L. D., 114) that the form, requiring the applicant to make sworn statement to the effect that "I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber," was prescribed. Prior to that date he was only required to swear that the land is unfit for cultivation and chiefly valuable for its timber. There appears to have been no law forbidding him to do this upon information and belief. And probably many entries went to patent where the affidavits were prepared in this way. Even after the instructions of May 21, 1887, were promulgated, it was held in the case of Grace v. Carpenter (14 L. D., 436) that—

The prior personal inspection of land required of an applicant under the act of June 3, 1878, does not necessarily require said applicant to actually pass over the land in question.

"Especially is this true where the actual status of the land is found to be as set forth in said affidavit."

I find nothing in Masten's affidavit, under the then existing regulations, incompatible with good faith.

If erroneous entry covered by the entry must have been properly allowed.

There does not seem to be anything in the laws or regulations requiring that the applicant shall *see* the witnesses to his final proof. So this allegation is an immaterial one.

In regard to the charge that Masten's final proof witnesses did not know the character of the land by legal subdivisions, I have examined their testimony. One witness says he is acquainted with the land described in its smallest legal subdivisions by having frequently passed over the same the two years last passed. The other says he has been personally acquainted with the land for two years; he ran the lines on two sides of it. The local office found this testimony satisfactory, and I think it must be so regarded.

The emphasis of your office decision of September 10, 1886, wherein this entry was held for cancellation, seems to have been directed to the fact that this land is not such as is subject to entry under the act of June 3, 1878, and that when cleared of its timber it would be fit for agricultural purposes. The alleged fraudulent character of Masten's entry was predicated on this principle. As previously shown, under the rather unsettled opinion as to what characteristics rendered timbered land fit or unfit for cultivation, his entry cannot be regarded as fraudulent.

This conclusion must not be interpreted as meaning that a less strict compliance with existing regulations governing timber land applicants will be demanded in the future; only that the strict requirements of the instructions of May 21, 1887, now in force, are not applicable to the case at bar.

I accordingly reverse your office decision and direct the repayment of claimant's fee and the purchase money paid by him.

MINING CLAIM—IMPROVEMENTS—CERTIFICATE OF SURVEYOR
GENERAL.

MILTON ET AL. v. LAMB.

A mineral entry cannot be allowed if the certificate of the surveyor general, as to the requisite expenditure on the claim, is not filed within the statutory period.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 24, 1896. (P. J. C.)

It appears that A. B. Lamb by his attorney in fact on December 20, 1893, filed application for patent for the Ferris (heretofore known as Ptarmigan) lode, survey No. 8705, Durango, Colorado, land district.

The return of the deputy mineral surveyor shows that \$500 worth of labor or improvements had not been made on the claim at that time, and the surveyor general did not make any certificate as to the improvements when the survey was approved or during the period of publication.

The period of publication expired February 23, 1894, and on March 2nd following, no entry having been made, William E. Milton *et al.*, filed a protest against the entry alleging, among other things, that no improvements had been made on the ground except that made by protestants. Two other protests were filed, one by Robert W. Bastian *et al.*, owners of the Bonita lode, and J. B. Hull *et al.*, owners of the Tam O'Shanter lode, but on January 18, 1895, they withdrew their protests.

A hearing was had and as a result the local officers held that the "applicant may not make entry in this case because he has not 'complied with the law,' in that he did not file" the certificate of the surveyor general as to the improvements within the time required by law. On appeal your office, by letter of November 27, 1894, affirmed their action, whereupon the applicant prosecutes this appeal.

Section 2325 R. S. provides that

the claimant at the time of filing his application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that \$500 worth of labor has been expended or improvements made upon the claim by himself or his grantors.

This certificate was not filed at the time of filing the application or within the period of publication. The deputy who made the survey certified to only \$125 worth of work, and from the testimony it is clear that no greater amount had been expended, in fact it is not claimed by applicant that there was a compliance with the statute in this regard. In view of the mandatory nature of the statute quoted it seems to me it is idle to argue that this application should go on to patent. This requirement is as imperative as any other. With as much propriety it might be said that the survey could be omitted or notice of application in either form be dispensed with. X The obvious intent of Congress in requiring this expenditure was to evidence the good faith of parties seeking patent under the mineral laws, that by the labor done or improvements made it would be apparent that it was mineral land and subject to entry as such. The condition is akin to that of settlement and improvement under the pre-emption and homestead laws, and the requirement is as imperative in the one case as in the others. T

It appears that a certificate of the surveyor general made May 29, 1894, was filed in the local office June 2nd following showing the required expenditure. But this cannot be accepted as meeting the mandate of the statute, which requires it to be filed at the time of filing his application or "within the sixty days of publication."

Your office judgment is therefore affirmed.

within its jurisdiction, until the passage of the act of April 28, 1870 (16 Statutes 93).

When the first surveys were made in Nebraska in 1858, and in Dakota in 1861, the Missouri river a short distance above the mouth of the Big Sioux river turned suddenly and ran south about four miles; then sweeping eastwardly and northwardly it returned to a point opposite to and only a short distance from its turning aforesaid, thus making a loop, which enclosed a peninsula, about $2\frac{1}{2}$ miles long and 23 chains and 60 links wide across its neck, and containing 890.12 acres according to the maps on file. This little peninsula, being on the left bank of the Missouri river, belonged to Dakota. Sometime between 1867 and 1869 the river cut for itself across the narrow neck of the peninsula, a new and main channel; and thus transferred (so to speak), the 890.12 acres aforesaid from the left to the right of the river; and left its former bed, which had nearly surrounded them, to become dry land. To prevent any conflict of jurisdiction between the State of Nebraska and the Territory of Dakota, Congress by the act aforesaid established the middle of the new channel as the boundary line between them, and ceded to Nebraska exclusive jurisdiction over the lands embraced in the peninsula and in the former bed of the river; and directed the Secretary of the Interior to cause to be made all necessary surveys, meanderings, maps and so forth.

On June 15, 1870, the surveyor general approved a map now on file in your office, which shows the new channel and the old channel and the peninsula, and the subdivisions of the former bed of the river into lots, adjusted to the surveys of 1858 and 1861 aforesaid, which had been made from different meridians and base lines. It appears by said map that lots 10 and 11 of section 1, and lot 1 of section 2 aforesaid, form together an oblong tract of land, whose eastern boundary is the former left bank of the Missouri River as it was officially meandered in 1858, and whose western boundary is the middle line of the main channel of the river as it stood, the boundary between Nebraska and Dakota, previous to the opening of the new channel, which made dry land of the former river bed.

In 1862 and 1864 and for years before and afterwards, the three lots in controversy were part of the bed of the Missouri river covered with the waters of its main channel. They were not part of the public domain subject to disposition by Congress as public lands. It is incredible, and therefore cannot be presumed, that in 1862 and 1864, Congress intended to grant *in presenti* the bed of the Missouri river to a railroad company.

The grant is of alternate sections of public land; and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. (Field J. on page 538 of 145 U. S., *Bardon v. Northern Pacific Railroad Company*.)

The lots of land aforesaid were not embraced in, and did not pass under the grants aforesaid. It is therefore immaterial to inquire on

what day the map of definite location was filed, or what were the limits defined thereby.

Your office decision is hereby reversed. Phillips's entry will be held intact.

MINING CLAIM—ADVERSE CLAIM—JUDICIAL PROCEEDINGS.

BLACK QUEEN LODGE *v.* EXCELSIOR No. 1 LODGE.

On application for mineral patent the purchaser may exclude land covered by an adverse claim, and take patent for the land not in conflict, without waiving his possessory right to the remainder.

Where co-owners of an adverse claim bring separate suits in their individual names, and in different courts, a dismissal of the junior proceeding will not confer jurisdiction upon the Department to proceed with the application and allow the entry.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 24, 1896. (P. J. C.).

The record before me shows that the Crystal River Mining Company made application April 8, 1890, for patent for the Black Queen lode mining claim, survey No. 5783, Glenwood Springs, Colorado, land district; that during the period of publication C. J. S. Hoover and Alfred Oskamp filed, on June 10, 1890, their protest and adverse against the same showing a surface conflict of less than one acre with Excelsior No. 1 lode. In support of said adverse Oskamp, individually, brought an action in the U. S. circuit court for the district of Colorado, on July 7, 1890. On July 8, 1890, Hoover commenced an action, in his individual name, in the district court of Gunnison county, for the same purpose.

On September 23, 1892, in the district court of Gunnison county, it is shown that on written application of the plaintiff (Hoover), his suit was dismissed "without prejudice to the rights of the defendant to proceed herein on its answer and cross-complaint." Judgment was thereupon rendered for the defendant on its cross-complaint for the land in conflict.

On June 18, 1895, The Crystal Company made application to purchase the Black Queen, and the same is indorsed by the receiver as follows:

Purchase money tendered and refused because of failure of claimant to furnish satisfactory evidence of disposal of adverse suit. Excelsior No. 1 *v.* Black Queen.

On June 26, 1893, the judgment and decree of the district court of Gunnison county was filed in the local office, but no action seems to have been taken concerning it. The claimant appealed from the action of the local officers, and your office, by letter of August 29, 1895, affirmed their action, whereupon it prosecutes this appeal.

It is shown by a certificate of the register of the United States Land Office at Gunnison that final entry of Excelsior No. 1 claim was made.

in that office September 24, 1894, by Hoover and Oskamp, and the receiver's receipt issued therefor. The register in his certificate says, "that said lode claim as entered excluded the territory in conflict with the Black Queen lode, as shown in the attached copy of an adverse on file in this office." A comparison of this plat with that filed by Hoover and the description in the decree of the court shows it to be substantially the same ground.

It is urged that this action by Hoover and Oskamp is a waiver on their part of the ground in conflict. I do not so view it. If they had filed an abandonment of the land, then it might be said that the entry by the Black Queen would be permitted. But the showing here is only that they have excluded the territory from the entry. This they may do and secure patent for the part thus entered, and hold the excluded ground under their possessory right. In *Branagan v. Dulaney* (2 L. D., 744), Mr. Secretary Teller, on page 751, said:

The government gives the possessor of a lode his choice, to hold it without patent or to take patent. If he attempts to take a patent and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure a patent, and continue to hold by right of possession. Thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he choose so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith. If the adverse is for a portion only of the claim of the applicant, he may elect to take patent for the portion of his claim that is not in controversy, and he may withdraw from his application so much of his original claim as is in controversy. By such withdrawal he leaves the part of his claim claimed by others in the condition it was before his application. He may then abandon his claim thereto, or he may litigate as to his rights with the party claiming adversely.

It is also contended that the judgment of the State court in favor of the Black Queen was sufficient in itself to give the owner the right to patent the land. The course pursued by the adverse claimants is a little difficult to understand. There was no apparent necessity for each of them bringing an action in their individual names in different courts, though of concurrent jurisdiction, to settle this controversy. But they have done so, the United States court still has jurisdiction of the subject matter, and until the courts acts, the Department is without jurisdiction.

There is no explanation offered as to why these two suits were commenced. But it is shown that Oskamp is not a resident of Colorado, while Hoover resides in Gunnison county. It is, therefore, not improbable that each may have begun proceedings without the knowledge of the other.

The statute (Sec. 2326) provides that after the adverse claim is filed, all proceedings "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

It is true that the Black Queen has a judgment, but it was obtained in the junior action, and after the plaintiff had dismissed his suit. But

it seems to me that the controversy has not "been settled or decided" as required by law, and that the entry can not be permitted in the present state of the record.

Your office judgment is therefore affirmed.

PRACTICE—PROTEST—CORROBORATION—TIMBER LAND ENTRY.

PIERCE v. BOND.

The corroboration of a protest is not a pre-requisite to its recognition as a proper basis for inquiry where the facts as charged, if true, are a matter of record of which judicial notice must be taken by the officers of the Land Department.

A protest against a timber land entry, on the ground that the land is not subject to such appropriation for the reason that it had been previously offered at public sale, states a sufficient cause of action.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 24, 1896. (E. E. W.)

On the 22d of June, 1893, the above named defendant, P. D. Bond, made cash entry of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 15, T. 49 N., R. 8 W., at Ashland, Wisconsin, under the act of Congress of June 3, 1878, known as the timber and stone act, as amended by the act of August 4, 1892.

On the 5th of October, 1894, the plaintiff, S. F. Pierce, made application to enter the land under the homestead laws, and also filed a protest against Bond's entry, alleging that the land had once been offered at public sale, and for that reason it was not subject to entry under the timber and stone act. The register and receiver rejected this application to enter, because of Bond's entry, and Pierce appealed.

On the 3d of November, 1894, the Commissioner of the General Land Office affirmed the action of the register and receiver in rejecting Pierce's application to enter, and also denied a hearing on his protest, because it was not corroborated, and did not allege facts sufficient to constitute a cause of action. Pierce then appealed to the Department.

The decision of the Commissioner is erroneous, and the grounds upon which it is based are not as fully stated as they ought to be. It was not necessary for the affidavit of protest to be corroborated. The only material allegation was that the land had been offered at public sale according to law, and for that reason not subject to purchase under the timber and stone act. This was a fact which, if true, was a matter of record in the office of the register and receiver and Commissioner, and of which they were required to take judicial notice, and the proof of which was in their own hands. More than this, it was a fact which, in the very nature of the case, it is not to be supposed that any person outside of their offices could testify to from personal knowledge.

And the fact alleged is a cause of action. The act of June 3, 1878 (20 Stat., 89), only authorized the sale of such of the surveyed public lands in California, Oregon, Nevada and Washington as were valuable chiefly for timber and stone, but unfit for cultivation, and which had

not been offered at public sale, and were not included in any military, Indian, or other reservation of the United States. Lands which had been offered at public sale were not of the class that were authorized to be purchased under this act. The act of August 4, 1892 (27 Stat., 348), makes this act applicable to all the public land States, and provides that stone land may be purchased in smaller tracts than forty acres, as provided in the placer mining laws, but does not amend it in any other particular. It does not authorize the purchase of lands that have been offered at public sale.

The decision of the Commissioner of the General Land Office is reversed, and the case is remanded with instructions to find from the records whether the land in question had been offered at public sale prior to Bond's purchase, or not, and pass upon the final proof and protest in accordance with this decision.

CONTEST—RELINQUISHMENT—SECOND CONTESTANT—INTERVENING ENTRY.

HUFFMAN *v.* MILBURN ET AL.

The right of a second contestant to be heard, who alleges the collusive character of the prior contest, in addition to his charge against the entry, can not be defeated by a subsequent intervening entry made on relinquishment of the entry under attack, and with notice of the second contest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 24, 1896 (C. J. W.)

November 16, 1891, Moore M. Milburn made homestead entry No. 2258, for NW. $\frac{1}{4}$ of Sec. 26, T. 12 N., R. 6 E., I. M., Oklahoma land district, Oklahoma Territory.

April 26, 1892, E. H. Hanna filed contest affidavit against said entry, alleging abandonment.

On May 31, 1892, Huffman filed affidavit of contest, alleging that Milburn, who made homestead entry No. 2258, has never established residence on said land as required by law, but has wholly abandoned the same, for more than six months since making said entry, and that said abandonment still exists.

On June 3, 1892, Milburn's homestead entry No. 2258 was canceled on presentation of his relinquishment of date April 8, 1892, and on the same day John J. Craigmyle made homestead entry No. 4550 for the same land.

The case was set for hearing July 15, 1892, and on the day preceding the hearing the following agreed statement of facts was filed as between Hanna and Milburn:

E. H. HANNA	}	Involving NW. $\frac{1}{4}$, Sec. 26, T. 12 N., R. 6 E., I. M.
<i>v.</i>		
MOORE M. MILBURN.		

Agreed statement of facts as agreed to between the parties in the above entitled cause.

1st. That Moore M. Milburn made H. E. 2258 at Oklahoma City land office for the NW. $\frac{1}{4}$ of Sec. 26, T. 12 N., R. 6 E., I. M.

2d. That he has not resided on said land with his family, since making said entry.

3d. That he has never improved or cultivated said land.

4th. That E. H. Hanna is qualified to make homestead entry under the homestead law.

This statement is signed by Milburn and by L. H. Barlow, attorney for plaintiff.

July 21, 1892, the local officers rendered a decision, recommending the cancellation of homestead entry No. 2258.

On July 26, 1892, H. Huffman made a motion for a hearing, alleging that he filed a contest against Milburn's entry on May 31, 1892, and that subsequent to his filing contest Milburn relinquished his entry, and one Craigmyle filed homestead entry No. 4550. That the contest of E. H. Hanna against Milburn was submitted after Milburn had relinquished to the United States, and had no rights attaching to said land. In support of this motion Huffman referred to, and asked to be made a part of his motion, the records of the office tract book and contest docket, also contest affidavit No. 1225, filed by him on May 31, 1892, and contest affidavit attached to motion. In said last named affidavit Huffman alleges that he filed his contest in good faith, and has at all times been, and now is, ready to prosecute the same; that about May 20, 1892, Milburn told him that he secured Hanna to file a contest against his entry, and that he (Milburn) furnished all the money to pay expenses; that said contest was filed for the purpose of keeping other parties from filing a contest, and that Milburn told him further that he had executed a relinquishment for his entry, which was then in the hands of one Vanderwerker, his attorney, who was authorized to sell his claim.

On September 6, 1892, Huffman filed an amended affidavit wherein he alleged that J. L. Vanderwerker sustained confidential relations with Milburn as his attorney; that in order to protect Milburn's entry Vanderwerker procured E. H. Hanna, a resident of Kansas, to file her contest against said entry, so that he might sell and relinquish to the purchaser in such way as to defeat his (Huffman's) contest; that the agreed statement of facts submitted in the case of Hanna v. Milburn was for the purpose of making a pretense of prosecuting the case in good faith, when it was in fact fraudulent, and that Craigmyle was a party to the fraud.

Your office finally, on May 29, 1893, directed that a hearing be had, of which all parties in interest should have notice, and be allowed to introduce testimony in support of their respective claims.

On August 17, 1893, such hearing was had, at which Huffman and Craigmyle appeared and offered testimony, and on May 3, 1894, the local officers rendered their decision, recommending the cancellation of Craigmyle's entry, No. 4550, and awarding preference right of entry to Huffman.

It seems from an affidavit of Huffman, that the whereabouts of Hanna is unknown, and she does not appear to have any interest in the litigation.

Craigmyle appealed from the decision of the local officers, and on December 1, 1894, your office affirmed their decision. Craigmyle has appealed from your office decision, in which appeal he specifies seven grounds of error, which may be substantially embraced in two propositions, viz:

1. That it was error on the part of your office to order a hearing, after Milburn had relinquished his entry, and after appellant had been allowed to make entry.

2. That it was error to hold that appellant was connected with any fraud which tainted his entry.

The date of Milburn's relinquishment is fixed, not by the date of its execution, but by the date of its filing in the local office. As it was filed on the 3d of June, 1892, and Craigmyle's entry was made on the same day, and as Huffman's contest was filed on May 31, 1892, Huffman had surviving rights as second contestant, if Hanna's contest was fraudulent or collusive, and Craigmyle had notice of Huffman's contest before he made entry. Craigmyle was, by operation of law, charged with notice of whatever evidence in reference to contests against Milburn's entry appeared of record at the date of his (Craigmyle's) entry. I am, therefore, of opinion that it was not error to order a hearing in the case to ascertain the facts pertaining to the rights of adverse claimants. The discretion of the Commissioner in ordering hearings will not be interfered with, unless there is apparent abuse of that discretion.

The contest of Hanna *v.* Milburn was not finally disposed of until July 28, 1893, when it was dismissed by T. H. Barlow, attorney for Hanna. This left the contest of Huffman pending, which contained as originally presented the charge of abandonment by Milburn, as well as the charge, by amendment, of the collusive character of Hanna's contest. The charge as to both propositions seems to have been fully supported by the proof, and the local officers and your office have agreed in so finding. Huffman's original affidavit of contest, filed May 31, 1892, was duly corroborated; prayed for a hearing and permission to prove the charges therein, and for preference right of entry. Under the state of facts presented by the record, your office properly held Craigmyle's homestead entry No. 4550 for cancellation, subject to Huffman's preference right of entry, which decision is hereby approved.

RAILROAD GRANT—LANDS EXCEPTED—DONATION CLAIM.

OREGON AND CALIFORNIA R. R. Co. v. JONES.

A donation claim, void on its face, does not except the land covered thereby from the operation of a railroad grant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 26, 1896. (J. A.)

The land involved herein is the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 5 of section 15, T. 6 S., R. 2 W., Oregon City, Oregon, land district.

Said tract is within the limits of the grant made by the act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, and opposite the section of said road that was definitely located January 29, 1870.

Your office rendered decision herein November 20, 1894, stating that the records show that James D. Taylor filed donation notification No. 7328 for said tract October 1, 1855, and that his claim was not canceled until June 29, 1886. The claim of said company to the land was therefore rejected with a view to the issuance of patent to Samuel W. Jones, who had submitted final proof on his homestead entry made for said tract July 7, 1886.

The appeal of the Oregon and California Railroad Company from said decision brings the case before me for consideration.

The appeal is accompanied by a copy of the letter of your office of June 29, 1886, canceling Taylor's donation claim as to the tract in question, for the reason that said tract was not included in his original donation claim, but was added to the same after the expiration of the donation law.

The appeal assigns error in substance in holding that Taylor's claim, which was void *ab initio* because made after the expiration of the donation law, excepted the land from the grant.

By section five of the act of February 14, 1853 (10 Stat., 158), the provisions of the donation act of September 27, 1850 (9 Stat., 496), under which Taylor claimed the land, were extended and continued in force until December 1, 1855.

As the decision appealed from states that Taylor filed donation notification for the land in controversy October 1, 1855, and as it appears from the copy of the letter of your office of June 29, 1886, that Taylor's claim to the land was canceled for the reason that the land formed no part of his original claim, but was added to the same after the expiration of the donation law, December 1, 1855, I have caused the records of your office to be examined in regard to Taylor's donation claim. The examination discloses that Taylor, on November 28, 1855, filed donation notification for the fractional NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 15. In 1860 he offered final proof showing residence and cultivation for four years. June 7, 1861, he applied to have the tract in contro-

versy added to his original claim, admitting, however, that he did not form the intention of claiming the land under the donation law until after December 1, 1855. He made no further proof, but on November 22, 1877, donation certificate issued to him and his wife for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 1, 2, 3, 4 and 5 of said section 15. Your office, on January 21, 1885, held the claim for cancellation as to the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 5, the land in controversy, for the reason that Taylor did not intend to acquire title to the same under the donation laws until after December 1, 1855. On Taylor's failure to appeal from said decision his claim to the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 5 was canceled by the letter of June 29, 1886, above referred to, a copy of which was filed with the railroad company's appeal herein.

As Taylor stated in his application of June 7, 1861, to have the land in controversy added to his original claim, that he did not intend to acquire title to the same under the donation laws until after December 1, 1855, his claim to the land was not only void *ab initio*, but void on its face, and therefore did not have the effect of excepting the land from the operation of the grant of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad. Taylor's application of June 7, 1861, was void on its face for the further reason that a donation notification can not be amended, after completing the term of residence required and making final proof, to include other lands. John J. Elliott, 1 L. D., 303.

Jones, the present homestead claimant, should, however, after due notice to the company, be allowed to submit proof as to whether Taylor was, on January 29, 1870, the date of the definite location, qualified to acquire title to the land under the homestead or pre-emption laws. The decision appealed from is accordingly modified.

TIMBER CULTURE ENTRY—FINAL PROOF.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 25, 1896.

REGISTERS AND RECEIVERS.

United States Land Offices.

GENTLEMEN: Your attention is called to the following act of Congress entitled "An act relating to final proof in timber-culture entries," approved March 4, 1896:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That timber culture claimants shall not be required in making final proof, to appear at the land office to which proof is to be presented or before an officer designated by the act of May twenty-sixth, eighteen hundred and ninety,

within the county in which the land is situated; but such claimant may have his or her personal evidence taken by a United States court Commissioner or a clerk of any court of record under such rules and regulations as the Secretary of the Interior may prescribe.

The testimony of the witnesses in either commutation proof or final proof on timber-culture entries must be taken in the same manner and under the same restrictions provided by previous laws, but the testimony of the claimant in such cases may be taken by any of the officers mentioned in the act, wherever the claimant may happen to be.

This act also applies to cases in which final proof may have heretofore been made, wherein the claimant's testimony was taken outside the county and State, or district and Territory in which the land is situated, and if any cases of this character are pending in your offices you will adjudicate them accordingly.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

JNO. M. REYNOLDS,
Acting Secretary.

HOMESTEAD ENTRY—SOLDIER'S WIDOW—RESIDENCE.

ELLA I. DICKEY.

The widow of a deceased soldier or sailor, who makes homestead entry under the provisions of section 2307 R. S., must identify herself with the tract claimed by some personal act of settlement thereon indicative of her claim, but need not reside on the land.

Proof of settlement on the land by the widow will not be required under an entry of such character, made at a time when the departmental regulations recognized cultivation of the land as substantial compliance with the law, if proof of cultivation is duly furnished.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 26, 1896. (W. A. E.)

On April 27, 1887, Ella I. Dickey, as the widow of John H. Dickey, a deceased soldier, made homestead entry under the act of June 8, 1872 (Section 2307 of the Revised Statutes, U. S.), for the SE. $\frac{1}{4}$ of Sec. 24, T. 15 N., R. 31 W., North Platte, Nebraska, land district.

April 21, 1894, she offered final proof, after due notice, and on April 23, 1894, final certificate and receipt were issued.

September 18, 1894, your office rejected the proof as insufficient, no residence being shown, and directed the local officers to call upon Mrs. Dickey to show cause why her entry should not be canceled. From this action Mrs. Dickey has appealed, assigning as error the finding of your office that the widow of a deceased soldier, who makes homestead entry under the provisions of section 2307 is required to reside upon the land embraced in her entry.

The final proof shows that Mrs. Dickey has had thirty acres of this tract cultivated each year for six years, but that she has never placed a house on the land or resided thereon. A certified copy of her husband's honorable discharge from the military service of the United States is furnished with her final proof. It is further shown that appellant was married to John H. Dickey on January 18, 1870, that her husband died October 27, 1883, leaving her with four small children to support, and that she has never remarried. John H. Dickey never made a homestead entry during his lifetime nor has his widow ever before attempted to avail herself of the privileges of the homestead law.

Section 2307 of the Revised Statutes, under which this entry was made, reads as follows:

In case of the death of any person who would be entitled to a homestead under the provisions of section twenty three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

It is to be observed, in the first place, that no distinction in regard to requirements is made between the widow and the guardian of the minor heirs (who by the terms of the statute stands in the place of the heirs and performs all acts necessary to be performed by them); and, in the second place, that the word "residence" does not occur in the entire section.

So far as can be learned, the Department has never passed upon the question involved in this case, but it has decided that:

Residence is not required under a homestead entry made by a guardian for the benefit of the minor orphan child of a deceased soldier. *Lamb v. Ullery*, 10 L. D., 528.

In the case cited, it appears that Ullery, as guardian of the minor heirs of Samuel Jacobs, a deceased soldier, made homestead entry for the benefit of said heirs. Contest was filed by Louis D. Lamb, on the ground that,

Neither the said Alonzo B. Ullery, Samuel Jacobs, nor Mary Jacobs has ever become a resident of said land; that they have wholly abandoned said tract; that they have changed their residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said parties as required by law.

The testimony showed that the guardian, as such, had made settlement on the land soon after date of entry; that the land had been cultivated and improved for the required period; but that neither the guardian nor the heirs had lived thereon.

The heirs for whom this entry was made were quite young and lived with their mother, who had remarried. Their guardian, Ullery, lived in Denver, Colorado, and was an attorney at law.

On this showing the contest was dismissed, it being held that residence was not necessary. It was said in regard to section 2307:

The word "residence" is omitted, and we can not assume that it was accidentally left out of the requirements, nor can we enlarge the statute by a departmental decision.

This brings us to a consideration of the second point to which attention was called above.

The words "residence" and "reside upon" do not occur in section 2307, but it is provided that the entry shall be "subject to all the provisions as to *settlement* and improvement," etc.

What is the meaning of the word "settlement?" Is it synonymous with "residence," or does the one necessarily imply the other?

In 1871, the Hon. Assistant Attorney General Smith defined a "settler" to be a person,

who, intending to initiate a claim under any law of the United States, for the disposition of the public domain, does some act, connecting himself with the particular tract claimed, said act being equivalent to announcement of such his intention, and from which the public generally may have notice of his claim. Such act constitutes a settlement. Copp's Public Land Laws, Ed. 1875, p. 693.

This definition has uniformly been followed by the Department (as witness the numerous cases in the Land Decisions), and is the law today.

The two elements of legal settlement, then, are: the *intent* to appropriate a particular tract under some law of the United States, and the *act* indicative of that intent, which act must be performed upon the tract claimed and be sufficient notice to the public generally of such claim. When these two elements concur, there is a "settlement." *Howden v. Piper*, 3 L. D., 294.

It is evident from this definition that settlement and residence are very different things. Settlement is complete at the very instant that a person intending to initiate a claim to a particular tract does some act upon the tract indicative of his intention. Residence is a continuing act. At no time in the history of the public land system of the United States have settlement and residence been regarded as synonymous. As far back as April 25, 1846, Attorney General Mason, in his opinion of that date, said:

Settling, inhabitaney, and improving are all circumstances to be performed and proved, but they are not synonymous in their meaning. 4 Opinions, 493.

Under the general homestead and pre-emption laws settlement must be followed by residence—residence being an express requirement—and this fact has led to some confusion in the use of the terms "settlement" and "settler," but in a science of exact definitions, such as law is, care should be taken to preserve, as far as possible, clear-cut distinctions. "Settlement" does not mean "residence," nor does "residence" mean "settlement." Residence is the highest evidence of settlement, but is not necessary to its existence. A person may make settlement upon a

tract without ever residing there a day. Unless, therefore, a statute explicitly requires residence or very plainly implies it, there is no authority for a departmental rule holding that residence is necessary to perfect an entry made under that statute.

We have just seen that section 2307 does not expressly require residence; does it clearly imply it?

It is necessary to observe that although there is a clear distinction between settlement and residence, yet they are usually associated, and accordingly when one term is used there arises a presumption that the other is also intended, even though not expressed. The question as to whether in any particular case this presumption is strong enough to warrant an express departmental rule to that effect, depends upon the wording of the statute, the objects to be attained by it, and the evident intent of Congress.

Sections 2304 to 2309, inclusive, of the Revised Statutes, are taken from the act of June 8, 1872 (17 Stat., 333). The first section of said act provides for the entry under the homestead law by honorably discharged soldiers and sailors of a quantity of land not exceeding one hundred and sixty acres, and after providing for the filing of a declaratory statement and the deduction from the time required to perfect title of the time which the soldier or sailor has served in the army, navy, or marine corps, goes on to further provide:

That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his said homestead for a period of at least one year after he shall commence his improvements as aforesaid. (Sec. 2305 R. S.)

Immediately thereafter in the third section of said act (the section we are now considering) provision is made for homestead entry by the widow or minor orphan children of a deceased soldier or sailor, and the omission from this section of the express requirement of residence is a significant fact. It is not stated that the entry shall be "subject to all the provisions as to *residence* and improvements," etc. After having been used immediately above in the same act in regard to the soldier or sailor himself, why were the words "reside upon" omitted from section three, unless Congress intended that the statute should bear lighter upon the widow and orphans than upon the soldier or sailor? Is it not reasonable to suppose that the requirement of residence was intentionally omitted in the case of the widow and orphans? The Department has so held in regard to the minor orphan children. In the case of *Lamb v. Ullery*, above cited, it was said:

It cannot be reasonably demanded that a guardian should leave his home and business to go in person upon a homestead to make a residence for the sole benefit of his wards, and he could then only make a residence by virtue of his fiduciary capacity, and by the favor of the law; if he gives the land attention and cultivation, the law excuses his actual residence on it. If the heirs were compelled to make actual residence on the land, the object of the statute would be defeated in all cases where the children were too young to care for themselves.

The word "residence" is omitted, and we cannot assume that it was accidentally left out of the requirements, nor can we enlarge the statute by a departmental decision.

But we have seen that the statute makes no distinction between the widow and the guardian of the minor orphan children in regard to requirements. The same things are required of each. On what reasonable legal ground, then, could the Department base a rule requiring residence from the widow and not from the guardian of the minor orphan children? The reasons why residence should not be required in the one case are almost, if not quite, as strong as in the other. To require the widow to reside upon the land would be to deprive the statute of much of its beneficial effect. Such a rule would fall hardest upon the most deserving classes—those who, like this woman here, are encumbered with small children, or who, through poverty, or weakness, or inexperience, or womanly fear, are unable to cope single-handed with the hardships of a frontier life.

It is clear to my mind in the light of these considerations that Congress did not intend to require residence of either the widow, or the guardian of the minor orphan children, or the orphans themselves.

What, then, it may be asked, is the significance of the term "settlement" as used in section 2307?

We have just seen that section 2307 does not expressly require residence, but does require settlement; we have further seen that settlement is not synonymous with residence; and finally we have seen that the term settlement as used in the section under consideration does not imply residence. Has it then any definite meaning in this connection?

I take it to mean personal identification in some manner with the tract claimed.

Let us revert for a moment to the definition of the term settlement. We saw that the two essential elements of a valid settlement were, the intent to appropriate a particular tract under some law of the United States, and the outward, visible expression of that intention upon the tract claimed. Now, these two elements must concur in the same individual. In other words, the person who has the intent to appropriate must himself or herself give visible evidence upon the tract claimed of that intention. Settlement cannot be made through an agent.

In the section under consideration it seems to have been the intention of Congress to require of the widow or guardian some personal connection with the land, though the requirement of residence was avoided.

To this conclusion, then, we come, that the widow of a deceased soldier or sailor, who makes homestead entry under the provisions of section 2307 of the Revised Statutes, must identify herself with the tract claimed by some personal act thereon indicative of her claim, but need not reside on the land.

The final proof testimony submitted in this case shows that the tract

involved was cultivated and improved for a period of six years from date of entry, but it is not clear as to whether the claimant ever identified herself with the land by any personal act thereon. However, I find it unnecessary, in view of certain further considerations, to call for information upon that point.

At the time this entry was made, in 1837, the only expression of the Department as to the construction to be placed upon section 2307 was that contained in the general circular of March 1, 1884 (the circular then in force). On page 23 of that circular it is said:

The ruling relative to the widow or minor children of a deceased homestead party as to actual residence (page 15) is equally applicable to the widow or minor children of a deceased sailor or soldier; if the land is cultivated in good faith the law will be regarded as substantially complied with, although the widow or children may not actually reside upon the land.

Almost identically the same language is used in the general circulars of January 1, 1889 (page 26), and February 6, 1892 (page 19).

"If the land is cultivated in good faith the law will be regarded as substantially complied with." This is the information that the Department has given to the public through the medium of its general circulars, and with the law as thus construed Mrs. Dickey has strictly complied.

A departmental construction of a statute, until revoked or overruled, has all the force and effect of law, and acts performed thereunder are entitled to protection. *Mary R. Leonard*, 9 L. D., 189.

Your office decision is accordingly reversed, and the entry will be passed to patent.

HOMESTEAD CONTEST—DIVORCED WOMAN.

SUGDEN *v.* HIMSWORTH.

In the case of a wife who is divorced from her husband, on account of a crime committed by him that in effect dissolved the family relation, and for which he was convicted and incarcerated, her status may be regarded as that of a deserted wife, and as such, entitled to attack the homestead entry of her former husband during the period of his imprisonment, for the purpose of securing to herself and children the land on which she has continued to reside.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 26, 1896.* (G. C. R.)

On July 23, 1894, Hannah Sugden filed a contest affidavit in the United States land office at Spokane Falls, State of Washington. This affidavit reads as follows:

Personally appeared before me, H. Warner, a notary public in and for the State of Washington, Hannah Sugden, of Spokane county, State of Washington, who upon oath says:

1st. That she is well acquainted with the tract of land embraced in the homestead entry of James Himsworth, to wit, homestead entry No. 7490, being for the east half

of northwest quarter of section 20, township 28 north, range 44 east, W. M., made October 6, 1890. Affiant further says that on the 3rd day of July, 1884, in the City of Manistique, and State of Michigan, she was married to James Himsworth, and continued to live with him until about the 7th day of July, 1892.

2nd. That on the 30th day of September, 1892, that said James Himsworth was in the superior court of Spokane county, State of Washington, convicted of the crime of rape committed upon the fifteen year old daughter of this affiant by a former husband, and was upon said conviction duly sentenced to imprisonment in the penitentiary of the State of Washington, located at Walla Walla, for a period of fifteen years, and is now imprisoned in said penitentiary under said sentence.

3rd. That subsequent to the imprisonment of said James Himsworth, based upon the grounds of his said criminal acts and imprisonment, and that as a result of said proceedings she was on the 18th day of October, 1892, granted an absolute divorce from said James Himsworth.

4th. That affiant has been advised by those learned in the land laws of the United States, and upon such advice and information alleges the truth to be that James Himsworth is civilly dead, and therefore incapable of complying with the requirements of the law relating to residence, improvement and cultivation of a homestead; and that since his imprisonment the said James Himsworth has never been upon the land, never himself or by any representative or agent caused said land to be cultivated and improved, as required by law, and that said land has for a period of about two years been uncultivated by the said James Himsworth, or any representative or heir.

5th. That during their married life there was no issue born to the said James Himsworth and this affiant, but that this affiant at the time of the marriage with the said James Himsworth had three children by her former husband, and that nearly all the improvements located upon said land at the time of the imprisonment of said James Himsworth had been placed there either by the personal labor or with the earnings of this affiant and her said children, and that this affiant claims said improvements, and alleges that both in law and equity she should be decreed to be the sole owner of said improvements and the whole thereof. That ever since the 6th day of October, 1890, this affiant, together with two of her children, has resided upon said land. That at the time of the obtaining of her divorce from said James Himsworth there was no property belonging to the said James Himsworth that could be decreed or given to this affiant for the purpose of maintaining her, and that she received nothing from said James Himsworth. That since his imprisonment the said James Himsworth has sent notice to this affiant that she and her children must move off the place, and is threatening to institute proceedings to eject this affiant from said land.

Therefore this affiant asks that a time and place may be named by the register and receiver for a hearing, and that she may be allowed to prove said allegations, and to show that said claimant James Himsworth is civilly dead; that the land has not been cultivated by any heir or representative of the said James Himsworth, as required by law, and that said homestead entry No. 7490 may be decreed canceled and forfeited to the United States, and that the said contestant may be allowed to pay the expenses of such hearing, and if said cancellation be granted, may be allowed to make homestead entry of said tract of land, this affiant alleging that she is duly qualified under the laws of the United States to make a homestead entry.

HANNAH SUGDEN.

The register and receiver held that the facts set forth in the affidavit do not constitute abandonment, because the absence from the land was by reason of judicial compulsion, which excuses such absence. A hearing was therefore refused.

On appeal, your office, by decision of October 15, 1894, affirmed that action. A further appeal brings the case here.

It is the well settled doctrine of this Department that a settler on the public lands, undertaking to acquire title thereto by compliance with the public land laws, may be excused for temporary absences caused by well founded apprehensions of violence, by sickness, by presence of an epidemic or by judicial compulsion. This doctrine has also received the sanction of the Supreme Court of the United States. *Bohall v. Dilla*, 114 U. S., 47.

In most cases, if not in all, where the abandonment was the result of judicial compulsion, and it was held by the Department that absence from the land was the result of duress and therefore excusable, it appears that the contest was brought by some one other than the former wife of the settler, and that the charge of abandonment under judicial restraint can not be pleaded as against the wife or children of the entryman or settler.

In the case of *Reedhead v. Hauenstine* (15 L. D., 554,) defendant made homestead entry of a quarter section of land, improved the same, and lived thereon for one year; he was then arrested, tried, convicted and sentenced to death for the crime of murder; at the time the contest was brought alleging abandonment, he was in the penitentiary pending a review of the case in the supreme court of the State of Nebraska. He had a wife, but no children; his wife was unable to live on the place after the murder was committed by reason of poverty, and there was no cultivation of the place after that time. The cause of the abandonment was due entirely to his imprisonment. The wife asked that the contest be dismissed, and the entry allowed to stand for her benefit. Under these circumstances, the Department held that the absence of the defendant was the result of judicial restraint, and his residence was not interrupted thereby.

In the case of *Arnold v. Cooley* (10 L. D., 551), it was also held that absence from the land as the result of judicial restraint did not interrupt the residence which was maintained upon the land until the arrest was made. Cooley in this case was the first settler; he was arrested and taken to jail at Baker city, Oregon, and was there burned to death. His wife was insane, and a guardian was appointed for the two minor children. It was upon the protest of this guardian against the final proof of a subsequent settler, who alleged abandonment on Cooley's part, that the holding was made.

In *Anderson v. Anderson* (5 L. D., 6), it appears that the defendant was convicted and imprisoned for life on the charge of murdering his wife. His family then consisted of seven children—four being minors. He had fully complied with the law as to residence, cultivation, etc. After his arrest, but before his conviction, and for the purpose of protecting the property for all his children, he leased the land. The contest (alleging abandonment) filed by his son Charles, who, it appears,

last left the land, was dismissed, the Department holding that since he had complied with the law up to date of his arrest, his absence thereafter under judicial compulsion could not be considered a voluntary abandonment.

In all these cases, and others that might be cited, the abandonment under judicial restraint was charged by some one other than the wife of the entryman.

Here is a case, if the averments in the affidavit be true, where the entryman is in fact debarred from living on the land by judicial compulsion. But he was convicted of a heinous crime, so revolting that no woman with self-respect would ever after the commission of the crime consent to a resumption of the marital relations. She sought for and obtained a decree of divorce, which was provided for in the statutes of the State. She alleges that she has constantly lived on the land, and that with her own labor and means, and those of her children by a former husband, she has made all the improvements.

It is true, the entryman's absence was caused ultimately by the strong arm of the law; but back of all that and primarily in consequence of his own infamy and vile conduct against his own household, and in utter disregard of his marriage vows, he rendered his further presence on the land with his outraged wife and infant stepdaughter out of the question. Under such circumstances, even without arrest, the family ties were sundered. He was sent to the penitentiary for fifteen years; it will be well into the next century before he is released should he even live to the end of the term of his righteous incarceration. To allow him when he gets out to drive his divorced wife and her children from the land would be to put a premium upon crime. He should not be permitted to utilize his own infamy as an engine of oppression against his former wife, and take from her that which she alleges she has earned. She may be regarded as a deserted wife, for, as above seen, his conduct rendered his further relations as husband unbearable; his conviction for the offense gave him the legal stamp of a felon, and his imprisonment for fifteen years was a sequence of his crime. A voluntary act resulted in an involuntary restraint, but the act itself was tantamount to a dissolution of the family ties, and he alone was responsible; and if the necessary results of his own crime resulted in his abandonment of the land and the desertion of his wife (enforced though it may be), his wife may plead such desertion in furtherance of her own rights in respect to the land, upon which she has constantly maintained her residence.

In *Bray v. Colby* (2 L. D., 78), Secretary Teller laid down this rule:

When the entryman has established a residence and placed his wife upon the land, no one but his wife shall be heard to allege desertion, in proof of his change of residence or abandonment, during the period of seven years from date of the entry, provided that she maintain a residence on the land.

Also:

Within seven years from date of entry, if the wife, maintaining her residence on the land, shall allege and prove her husband's desertion of her, said entry shall be

canceled and she shall be permitted to enter the land in her own name, provided that she is the head of a family or that she has the legal right to acquire real property as a feme sole.

See also *Pawley v. Mackey*, 15 L. D., 596.

It is also the settled rule of this Department that a deserted wife is qualified as head of a family to make homestead entry. *Kamanski v. Riggs*, 9 L. D., 186; *Porter v. Maxfield*, 5 L. D., 42.

For the reasons above given, your office decision is reversed, and the contest affidavit of Mrs. Sugden (formerly Hinsworth) will be returned to the local office with directions to issue notice thereon, and allow a hearing upon the allegations contained therein.

RAILROAD LANDS—CASH ENTRY—ACT OF MARCH 2, 1889.

HAMILTON v. GREENHOOT ET AL.

The confirmation of a cash entry as provided for in the act of March 2, 1889, is not defeated by the occupancy of a pre-emption claimant who was an alien at date of settlement, and did not declare his intention to become a citizen until after May 1, 1888.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 26, 1896. (E. E. W.)

Statement: On the 21st of February, 1880, Solomon Greenhoot and Jacob Buckholtz made private cash entry of the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 7, T. 42 N., R. 34 W., at Marquette, Michigan; and on the 8th of March of the same year Samuel N. Stephenson and William Holmes made scrip location of the S. $\frac{1}{2}$ of the same quarter section. On the 27th of March, 1885, George A. Hamilton applied to file a pre-emption declaratory statement for the whole of the SE. $\frac{1}{4}$, which application the register and receiver rejected because of the prior entries of Greenhoot and Buckholtz, and Stephenson and Holmes, aforesaid. It is conceded that the land at that time was included in the grants to the State of Michigan to aid in the construction of the Marquette and State Line Railroad (11 Stat., 21), and not subject to entry, and that both entries were erroneously allowed. The act of Congress of March 2, 1889 (25 Stat., 1008), forfeited these grants, and confirmed all cash entries so erroneously allowed which the Secretary of the Interior should be satisfied were made in good faith, and upon which there were no *bona fide* pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and confirmed all such pre-emption and homestead claims. Pursuant to this act the Secretary of the Interior issued a circular on the 30th of December, 1889 (13 L. D., 423), requiring such cash entryman to file affidavits of good faith and publish notice of their claims for four consecutive weeks, and allowing settlers 30 days from the date of the first publication to file evidence of their claims. On the 16th of April, 1890, Greenhoot and Buckholtz filed their joint affidavit of good

faith, and asked for confirmation of their entry, and subsequently also filed proof of the publication from May 10, to May 31, 1890, inclusive, of the notice required by the said circular of December 30, 1889. On the 6th of May, 1890, Hamilton filed his affidavit of settlement and occupancy, and asked for confirmation of his claim. After various proceedings not necessary to recite here, the register and receiver heard the case, and rendered a decision on the 19th of June, 1894, recommending rejection of Hamilton's claim, and confirmation of Greenhoot and Buckholtz' entry of the N. $\frac{1}{2}$, and Stephenson and Holmes' entry of the S. $\frac{1}{2}$, of the said SE. $\frac{1}{4}$. Hamilton appealed, and on the 7th of December, 1894, the Commissioner of the General Land Office affirmed the decision of the register and receiver as to Hamilton and Greenhoot and Buckholtz, and also as to Stephenson and Holmes upon their filing the affidavit and making the publication required by the circular of December 30, 1889. In this decision the Commissioner found from the evidence that Hamilton settled on the land in February, 1885, built a house, improved and cultivated the land, and was in actual occupation of it on the first of May, 1888; and also that he was an alien and did not file his declaration to become a citizen until February 22, 1890. The Commissioner also found that Stephenson and Holmes had not complied with the requirements of said circular of December 30, 1889. From this decision Hamilton has appealed to the Department.

Opinion: The Commissioner's findings of fact are supported by the evidence, and his conclusions of law are correct. The entries of Greenhoot and Buckholtz, and Stephenson and Holmes, are of the class confirmed by the act of Congress of March 2, 1889, provided there was no *bona fide* pre-emption or homestead claim on the land on the first day of May, 1888, arising or asserted by actual occupation under color of the laws of the United States. Hamilton's claim was on the land on the first day of May, 1888, and it was *bona fide*, and arose and was asserted by actual occupation under color of the laws of the United States. But at that date he was an alien, and had not declared his intention to become a citizen, and an alien who has not declared his intention to become a citizen cannot acquire any rights to public land. Hamilton contends that the filing of his declaration of intention to become a citizen on the 22d of February, 1890, related back to the date of his settlement, or at least to the first day of May, 1888, and cured the defect in his qualifications as an entryman. But in this he is mistaken. It has been the uniform holding of the Department that an alien cannot acquire any right to public land prior to the filing of his declaration of intention to become a citizen. *Southern Pac. R. R. Co. v. Saunders* (6 L. D., 93), and cases there cited. It follows, therefore, that Hamilton's claim cannot be confirmed, and that it constitutes no bar to the confirmation of the entries of Greenhoot and Buckholtz, and Stephenson and Holmes.

The decision of the Commissioner of the General Land Office is affirmed.

MINING CLAIM—DISCOVERY—RECONVEYANCE OF PATENTED LODE.

WINTER LODE.

The discovery of mineral is a prerequisite to the location of a mining claim, and the discovery must be made on land open to exploration, not claimed or located by any other person.

The ruling in the Juniata Lode case, 13 L. D., 715, whereby the Department to avoid litigation consented to accept a reconveyance of patented placer ground for the purpose of passing title to the owner of a known lode therein, is not applicable as between two lode claims where the applicant for relief, with due notice, permits the patent to issue without protest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 26, 1896. (P. J. C.)

It appears that Charles C. Kellogg *et al.*, on July 19, 1881, made mineral entry No. 681 of the Winter lode, survey No. 896, Leadville, Colorado, land district. It is shown by the plat and field notes that the discovery shaft, upon which the statutory sum of \$500 had been expended, was upon ground that had been patented as the Independent lode, survey No. 467.

On consideration of the matter, your office, by letter of June 14, 1882, suspended the entry, and held that unless it could be shown that there was mineral within the limits of the claim, the Winter lode would be held for cancellation.

On June 3, 1887, Kellogg, on behalf of his co-owners, submitted a statement by which it was shown that the owners of the Independent lode had conveyed to the owners of the Winter lode, October 20, 1879, that part of the Independent lode which included the discovery shaft of the Winter. He asked:

If the ground conveyed to them by the La Clede Mining Company (patentee of the Independent lode) be reconveyed through that company to the United States, can a patent then be issued for the Winter lode?

In reply your office, by letter of June 20, 1887, held that this could not be done; required satisfactory evidence of the existence of mineral within and of \$500 improvements on the ground claimed; also further evidence as to the citizenship of one of the applicants.

By your office letter of December 4, 1890, a report was called for from the local office in reference to the requirements of your office letter of June 20, 1887, whereupon the applicants, on December 12, 1890, made a request to be allowed further time to comply therewith.

The matter again rested until February 18, 1893, when your office required a report as to what had been done by the applicants in regard to your former office orders. The report was that nothing had been done. Thereupon your office, on March 3, 1893, directed that the applicants be given sixty days to make the required showing,

or to take steps in accordance with the provisions of the Juniata decision, 13 L. D., 715, in order to secure patent for their claim.

In reply to this the claimants filed a supplemental abstract of title, showing a transfer by the La Clede Mining Company, dated and recorded October 20, 1879, to the applicants of a portion of the Independent lode, described as follows: "125 feet in length of the S. W. end of said lode, being 300 feet wide by 125 feet in length along the course of said lode, as shown by official survey 467." Also a mining deed from the claimants, dated May 25, 1893, and recorded June 6, following, to the United States, which the abstract says: "Conveys same premises as described in last entry," being the description above quoted.

On receipt of this your office, by letter of July 28, 1893, decided that the question involved in this case did not come within the rule in the Juniata case, and revoked that part of your office letter of March 3, 1893, requiring applicants to take steps in accordance with that decision; that the land had been patented to the Independent lode, and the government would not accept a reconveyance for the purpose of investing title in another, unless it was shown that the original patent was issued by fraud, accident or mistake, and in cases where the Department would be justified in recommending an action to set aside the former patent. The parties were again required to furnish the evidence theretofore demanded.

On August 9, 1894, nothing having been done, your office directed the register and receiver to give the claimants thirty days to show cause why their entry should not be held for cancellation. On September 18, following, the local officers reported that Kellogg "came into the office and read" your office letter of March 3, 1893. On September 26, 1894, your office called for a report as to what action had been taken in pursuance of your office letter of August 9, 1894.

No attention seems to have been paid to this demand, and on March 19, 1895, your office again called for a report, and in reply thereto the applicants filed an appeal on April 20, 1895, from your office decision of July 28, 1893. The errors specified are directed entirely to the action of your office in holding that the doctrine of the Juniata case can not be applied to the case at bar.

If it affirmatively appeared by the record that proper notice of the decision of your office of July 28, 1893, had been served on the claimants, this appeal would be dismissed. The only evidence of notice is the report of the local officers, made more than a year after the decision was promulgated, that Kellogg came into the office and read the letter. This is hardly sufficient to charge the applicants with notice, and inasmuch as this is an ex-parte proceeding, and the only question is one between the government and the entrymen, the appeal will be entertained.

The record facts in this matter have been gone into quite fully, for the purpose, principally, of showing with what disregard the appellants have treated the numerous orders of your office in endeavoring to have them comply with the rudimentary requirements of the law. It is conceded that the discovery shaft, upon which the \$500 improvements have

been placed, is not upon the ground included in the application for patent. It would seem idle to contend that the government could issue its patent for the land under such circumstances. The statute itself and all decisions of the Department and the courts make the discovery of mineral a prerequisite to the location of a mining claim, and the discovery must be upon land open to exploration, not claimed or located by any other person. The ground upon which this shaft is situated is included in the claim of another, and at the time of the application for patent the title to it had passed from the government by its patent of the Independent lode. The plat and field notes show unmistakably that the discovery shaft was not on the ground claimed by the Winter lode. The entry, therefore, should not have been allowed by the local officers.

The original abstract filed with the application shows that the La Clede Company had conveyed to the applicants "125 by 300 feet on the Independent lode" in October, 1879, just one year before the Winter lode application was filed. From this brief description in the abstract no one could conjecture that it was meant to convey the discovery shaft. The description furnished by the supplemental abstract is no more definite than that in the original, except that it shows the ground as located in "the S. W. end of said lode." But it is claimed by appellants that this description does include the shaft. If this be true, then at the time they made their application, and before patent issued to the Independent lode, whatever title the patentees had to this piece of ground vested in the Winter lode, and it was the duty of the owners of that lode, in order to protect their location, to have had it excluded from the Independent application and patent, because the very basis of their right to the Winter lode was included therein, and without their discovery and improvements, included in the land applied for, they could not hope to secure the government title. If they permitted the patent to issue in this way, there is no one to blame but themselves. The government had no means of ascertaining the deception practised on it by the Independent applicants in including territory they had divested themselves of, and it was therefore incumbent on the appellants to protect themselves.

The decision of your office that the doctrine of the Juniata case does not apply to the one at bar is uncontrovertible. In that case the question was whether the government would accept a conveyance from the patentees of a placer claim for a lode claim within its limits, and then patent the lode claim to the owners thereof. It was decided that this might be done, but it was upon the theory that the placer law, as well as the patent itself, expressly excluded from the grant any and all known veins or lodes. The practice of the Department at the time that decision was rendered, and prior to the South Star lode (20 L. D., 204), was, where it was shown that a known lode existed at the date of the application for patent for the placer, to recommend the institution of a

suit to set aside the placer patent, to the extent of the lode. But in the Juniata case the very object that would have been attained by a judgment was accomplished by the voluntary act of the patentee and his transferee, hence it would have been an idle ceremony to have gone through the courts. The reasons for permitting this are quite fully set forth in the opinion of my predecessor in the Juniata case, and are, I think, conclusive.

That doctrine could not, however, be applied to two lode claims, especially where, as in this case, the present applicants had due notice of all the proceedings to secure patent, in fact, had a deed to part of the land applied for by the Independent, and took no legal steps to protect their own rights. The same reasons that would prompt the Department in accepting the transfer of a lode claim within patented placer limits would not apply as between two lode claims. It cannot be said that it was through any accident, fraud or mistake that the ground in controversy was patented to the Independent lode, and for no other reason would the Department accept a reconveyance or recommend a suit to set aside the prior patent.

The contention of counsel that the applicants have been misled by your office suggestion of March 3, 1893, to bring their case within the Juniata decision, and by so doing have divested themselves of title to the land in dispute, and reinvested the government therewith, is without force. The government refuses to be thus reinvested or to assume the ownership, hence the grantors still have their right to the land. For nearly thirteen years prior to that act on their part they had been given every opportunity to comply with the law, and had neglected to do so. It would, therefore, seem as if they were in no position to complain of the action of your office.

Your office judgment is, therefore, affirmed.

CONFIRMATION—MISSION CLAIM—ACT OF MARCH 2, 1853.

LESHER *v.* ST. PAUL CATHOLIC MISSION.

The confirmation of title to mission lands under the act of March 2, 1853, is determined, as to acreage, by the actual occupancy of lands necessary to the proper maintenance of the mission.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 26, 1896.* (W. F. M.)

On June 8, 1893, John Leshner offered his pre-emption declaratory statement for "lot 1 of the island in the Columbia river and part of" section 11, township 36 N., range 37 E., Willamette Meridian, in the land district of Spokane Falls, Washington, and the same was rejected by the local officers

for the reason that it appears to be included in the land claimed by the Society of Jesus, in their application transmitted to your office, in our letter of June 19, 1891.

Lesher appealed to your office, and by office letter "D" of October 5, 1894, the decision of the local office was affirmed. Lesher has now brought the matter on further appeal here, and assigns eleven specifications of error, the eighth of which is quoted as follows:

Error in not holding that said island having been used simply as a temporary camping ground of the Indians while attending religious services at the Mission, could not be construed as "occupancy as a missionary station" within the meaning and intent of the confirmatory act of March 2, 1853.

The application of the Society of Jesus was originally transmitted to your office on January 19, 1891, and was made under the second proviso of the 1st section of the act of March 2, 1853, entitled "An act to establish the territorial government of Washington" (10 Stat., 172), the language of which proviso is as follows:

That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon, together with the improvements thereon, be, and is hereby, confirmed and established to the several religious societies to which said missionary stations respectively belong.

The said application was for lots 1 and 2, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and an island in the Columbia river, all in section 11, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, section 12, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, section 13, and lots 1 and 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, section 14, township 36 N., range 37 E., Willamette meridian.

Patent was issued on June 8, 1891, for all of this land, except the island in the Columbia river, of which no public survey had been made. The island contained about eighty-four acres, and having since been surveyed, the society has presented an application for a patent.

The act of March 2, 1853, *supra*, vests in the several religious societies occupying missionary stations in the State of Washington all the land, not exceeding six hundred and forty acres, actually occupied for the purposes of such stations.

The question presented in this case is, whether or not the Society of Jesus has shown by *ex parte* testimony accompanying its application such occupancy as brings it within the proviso and purpose of the act.

The case of the Northern Pacific Railroad Company *et al. v. St. Joseph's Roman Catholic Mission* (19 L. D., 196,) is the latest of the two cases that have been decided by this Department bearing on the question here presented, the first case being that of the Vancouver Catholic Mission (2 L. D., 452). In the latter case it was held generally that the area for which the Mission can claim title depended upon the extent of its occupancy, and that the occupancy in that case only included the church and the land upon which it stood, no further occupancy than that having been affirmatively shown. This view of the law was affirmed in the former case, where it was held

that it was only intended to confirm to the religious societies on account of their mission claims such lands as were shown to have been actually occupied by them in the maintenance of such missions.

It would seem, therefore, that actual occupancy has been established as the test of such rights.

In the present case the affidavit of J. Joset, S. J., for a long time intimately connected as superior general and in other capacities with the station here in controversy, touching the occupancy of the island, is as follows:

That he knows that the land above described, including the island in the Columbia River, was within the original boundaries of the Mission claimed; that the island in the river was a necessary and material part of the original claim, as it was used by the Indians as a camping ground and for pasture while they were at the Mission and attending religious services.

The facts thus testified to are corroborated by Magnus Fleet, aged sixty-five years, and Solomon Peltier, aged seventy-five years. (See Commissioner's decision.)

There is nothing in the record to contravene this contention of the society that the island was a necessary and material part of the mission. Indeed, it cannot be denied that camping and pasture ground was indispensable to the mode of life of the Indians, and it is certainly not going too far to accept the sworn statement of Father Joset that the island was used for those purposes.

I think your judgment should be affirmed, and it is so ordered.

OKLAHOMA TOWNSITE-PATENT-PUBLIC RESERVATION.

CITY OF PERRY.

The provisions of section 22, act of May 2, 1890, contemplate the issuance of patents for reservations within townsites directly to the municipalities, after their organization as such, and not to the townsite trustees.

A townsite patent issued to the board of trustees is not a final disposition of the government title, and if such a patent erroneously embraces lands reserved for municipal uses it may be recalled for correction.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 26, 1896.* (C. J. W.)

On June 20, 1894, parties styling themselves the mayor and councilmen of Perry, Oklahoma, filed with the register and receiver at Perry an application for patent, for the following reservation by said city viz: the W. $\frac{1}{2}$ of block 44, of the area of 61,250 square feet, designated on the official plat of said town "School house reserve," W. $\frac{1}{2}$ of block 9 of the same area, bearing same designation, E. $\frac{1}{2}$ of block 1, of same area and bearing same designation, and the eastern part of block 36, of the area of 70,000 square feet bearing the same designation, and block 32, of the area of 175,000 square feet, designated on said plat as "Public park reserve."

Attached to said application was the certificate of board No. 8 townsite trustees, to the effect that they had excluded the land applied for from their application for patent.

The application for patent was also accompanied by affidavit of applicants, that they held certificates of election and were the mayor and councilmen of Perry. The local officers, rejected said application and on December 21, 1894, the applicants appealed to your office. On January 19, 1895, your office passing upon said appeal affirmed the decision of the local officers, but directed that the board of townsite trustees to which patent to the land in question had already issued, execute title to applicants. From this decision applicants appeal and the question presented by said appeal, is whether under Sec. 22 of the act of May 2, 1890 (26 Stat., 81) patent should have issued to the board of townsite trustees, as was done, or should have been withheld and issued to the town when organized as a municipality. It seems that on September 25, 1893, townsite board No. 8 filed in the local office an application for the NE. $\frac{1}{4}$ Sec. 22 and NW. $\frac{1}{4}$, Séc. 23, T. 21 N., R. 1 W., I. M., excepting the reservations, now applied for.

Cash entry No. 1 was issued by the register for the land as applied for. By letter of December 30, 1893, your office directed the correction of the certificate, so as to embrace the reservation in question, which was accordingly done and patent issued to said board of trustees for and including this reservation February 7, 1894.

Your office has directed the conveyance of title to the municipality through the said board of townsite trustees. As this land was not included in their application to make entry for townsite purposes, but was expressly excepted therefrom, the amendment of the certificate of the register without their asking it and without their consent, would seem to be of doubtful legality. The act of May 2, 1890 (26 Stat., 81) contemplates that patents for reservations of this character shall issue directly to the municipalities, after their organization as such. The present application is made by the municipality of Perry, acting through its legal representatives the mayor and councilmen thereof.

In view of the fact that the patent issued to townsite trustees is not a disposition of the government title, as declared in instructions issued 15th of March, 1892, (14 L. D. 295) the patent already issued may be recalled for correction, the purpose being to effectuate the trust.

Your office decision is accordingly reversed, and so much of the patent issued February 7, 1894, to townsite board of trustees No. 8 as refers to and includes the reservation herein referred to is canceled, and the application of the mayor and councilmen for patent is approved and patent will issue accordingly.

DESERT LAND ENTRY—ASSIGNMENT—RELINQUISHMENT.

OWENS ET AL. v. STATE OF CALIFORNIA.

A relinquishment of a desert entry, by one holding under an invalid assignment, will not relieve the land from its previous state of appropriation.

Acting Secretary Reynolds to the Commissioner of the General Land Office, March 26, 1896. (W. F. M.)

On April 7, 1877, James E. McDonald made desert land entry of section 8, township 31 S., range 30 E., within the land district of Visalia, California. From September 28, 1877, to January 12, 1891, the entry stood suspended by departmental order.

On April 25, 1891, George S. Owens, John B. Dennis, Lee N. Stewart and John F. Thomas filed their joint affidavit of contest alleging the non-desert character of the land in that it would produce profitable crops of hay and grain without irrigation.

On March 24, 1893, the State of California filed a relinquishment of the entry, executed on March 13, 1893, by the heirs of Albert A. Bennett, the assignee of the entryman, McDonald, who made the assignment to the said Bennett on April 9, 1877. On the same date the State of California applied to make school indemnity selection, No. 3600 for the W. $\frac{1}{2}$ and No. 3603 for the E. $\frac{1}{2}$ of section 8.

The entry was accordingly canceled by the local officers and the State's selections filed and held pending notice on June 2, 1893, to the contestants Owens, Dennis, Stewart and Thomas that "they were allowed thirty days in which to exercise whatever rights they may have acquired by virtue of their said contest." On June 7, 1893, Dennis made homestead application to enter the NW. $\frac{1}{4}$, Stewart the SE. $\frac{1}{4}$ and Owens the SW. $\frac{1}{4}$ of section 8, and on June 26, 1893, Thomas applied for the NE. $\frac{1}{4}$ of the same section.

The contestants made no further appearance in response to the notice of June 2, 1893, and their contest was dismissed by the local officers.

The decision of your office, now on appeal here, finds that Bennett made desert land entry of section 32, township 30 S., range 29 E., on April 7, 1877, and the same remained of record until July 1, 1893, when it was canceled by the relinquishment filed by his heirs. It was held, therefore, that the assignment to Bennett by McDonald was a nullity, insomuch as the former could not, under the law, hold more than one section of land, and that, as a consequence, his heirs had no authority to relinquish the entry to which they had acquired no right by virtue of the invalid assignment. The cancellation of the entry was set aside, and the contests reinstated.

The effect of your office decision is to re-establish the case and the parties in the attitude occupied by them prior to the filing of the invalid relinquishment.

I concur in that disposition of the matter and the decision is, therefore, affirmed.

ARID LANDS—RESERVOIR SITE—HOMESTEAD ENTRY.

OWEN ROGAN.

An entry of land subject to the provisions of the arid land act of October 2, 1888, and subsequently designated as part of a reservoir site, may be suspended to await definite information as to the future use of the land by the government.

Acting Secretary Reynolds to the Commissioner of the General Land
(J. I. H.) *Office, March 26, 1896.* (G. C. R.)

John Rogan made homestead entry No. 4142 on March 16, 1889, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, T. 20 N., R. 8 W., Helena, Montana. The entryman died in the fall of 1889, and Owen Rogan, his father and heir, submitted final proof April 14, 1894, and final certificate No. 2207 issued to him as the heir.

It appears that all of said Sec 14, with other lands, was selected as an irrigating reservoir site, and under the directions of the Department of March 13, 1890, instructions were issued to the local officers to allow no entries or filings on the lands so selected.

This action was authorized by the act of October 2, 1888 (25 Stat., 526), which, among other things, provided that,

All lands which may hereafter be designated or selected (i. e., for reservoirs, canals, ditches, etc., for irrigating purposes,) are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement or occupation, until further provided by law.

This act applied to all lands which might thereafter be designated or selected for reservoir purposes, until further provided by law. Amanda Cormack, 18 L. D., 352.

The act approved August 30, 1890 (26 Stat., 391), provided that the lands theretofore located or selected for reservoir purposes

shall remain segregated and reserved from entry or settlement . . . until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of location or selection thereof.

The land in question appears to have been selected on January 8, 1890, for reservoir site No. 6, Sun River system, and by departmental order of August 18, 1894, directions were given that "all lands embraced in site No. 6 which are legally subject to reservation continue withdrawn from disposition until further action by Congress."

Rogan settled on the land after the passage of the act of October 2, 1888 (*supra*), and his settlement and entry were, therefore, made at his own risk.

Appellant asks that if your office decision be affirmed, and his entry canceled, that he be allowed to remain in possession of the land until such time as the United States may desire to use the land for a reservoir, that his equitable rights thereto and those of his heirs be declared only subordinate to those of the United States, and that proper notations be made, etc., of such action, to the end that the entry be rein-

stated should it finally be found impracticable to build a reservoir thereon, or it be found that the land is not needed for such purposes.

The Director of the Geological Survey, under date of July 3, 1893, reported that in the near future said site No. 6 (with others) will be needed for the storage of water for public purposes, and that while some of the lands covered by the sites will have to be acquired by condemnation, or other means, before the remaining lands can be used for reservoir purposes, yet he thinks it would be wise policy to reserve what is yet undisposed of, as their chief value is for reservoir purposes, and the future necessities must demand their acquirement in maintaining a proper storage of water, if opened to entry under the general land laws.

In pursuance of this report, the Department, on August 18, 1894 (Misc. press-copybook No. 290, p. 494), directed that all lands covered by the sites (mentioned by the Director, including said site No. 6), which are legally subject to reservation, "continue withdrawn from disposition to await further action by Congress in the matter of these reservoir sites."

Inasmuch as the reservation provided for by the act of October 2, 1888 (*supra*), was of an indefinite quantity of land without limit or description, embracing only such lands as "may hereafter be designated or selected" for reservoir purposes, it can not be said that the entry was wrongfully allowed, for it was clearly not the intention of Congress to reserve the whole of the undisposed of portion of the lands within the State.

This is made clear by the act of March 3, 1891 (26 Stat., 1095), which provides that such reservoir sites

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding as far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

The entryman is not presumed to have known that the land he entered would thereafter be "designated or selected" for a reservoir site, although, as above seen, he took that risk.

I can see no good reason for canceling this entry until it is definitely determined to use the land covered thereby for the proposed reservoir. Let the entry, therefore, be merely suspended, awaiting more definite information as to the future use of the land; if it is actually needed for the proposed reservoir, it will be time enough then to cancel the entry.

The Director of the Geological Survey should be informed of the action herein taken.

The decision appealed from is accordingly modified.

SWAMP LAND—TRANSFEREES OF THE STATE.

SMITH ET AL. v. MILLER.

Persons who derive title through the State to lands under the swamp land act, have a right to be heard, and make any objection to the allowance of an entry thereof, that might have been made by the State, had she not parted with her claim.

Acting Secretary Reynolds to the Commissioner of the General Land
(J. I. H.) *Office, March 26, 1896.* (C. J. W.)

The tract in question, the NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 33, T. 95 N., R. 33 W., Des Moines land district, Iowa, was selected by the State of Iowa as swamp land March 27, 1860. The State of Iowa, by act of its legislature of February 2, 1853, granted the swamp and overflowed land to the several counties, subject, of course, to the paramount title remaining in the United States.

The applicants, as shown by their abstract of title, have a warranty deed to the land in question from Porteus Roberts and wife, dated August 31, 1867, whose title was derived from Palo Alto county.

Your office reports that its records show that on July 26, 1886, Delano T. Smith, one of the claimants, made an application for a hearing to prove the character of the land and that on October 20, 1886, a hearing was ordered, but that no hearing was had.

December 31, 1891, Thomas Miller filed in the local office, an application to enter said tract under the homestead laws. He was allowed to make said entry subject to the claim of the State under the swamp land grant. Notice of the allowance of the entry was given to the governor of the State and to the auditor of Palo Alto county, allowing sixty days within which to object to said entry. No objection was filed by the State or county.

August 1, 1892, claimants made another application for a hearing to prove the swampy character of the land.

On January 19, 1893, the case was closed as to Miller's entry. Afterwards on October 24, 1893, your office refused the application of claimants of August 1, 1892, for a hearing. From this decision the claimants appealed. Their application for a hearing filed October 20, 1886, it would seem was still pending, unless it is to be considered as having been rejected with the rejection of the later one.

The allowance of Miller's entry, without allowing the objections of claimants to be heard, seems to rest upon the assumption that only the State or county could be heard. The reason why they did not object is apparent. They had parted with all interest in the land, and could make no objection.

I think the claimants who derived title from the State, had a right to be heard and to make any objection which the State could have made, had she not parted with her claim, and that it was error to deny the hearing.

Your office decision is accordingly reversed and a hearing ordered on the application of claimants, as to the character of the land.

RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

GARRETT v. SOUTHERN PACIFIC R. R. Co.

An indemnity selection will not be held invalid on account of the basis including a fractional tract that is in fact not lost under the grant, if it appears that the designation of loss, without including said tract is sufficient to support the selection.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 26, 1896. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 19, T. 33 S., R. 25 E., Visalia land district, California.

The record shows that on May 19, 1888, John M. Garrett made timber culture entry for the above described tract. This, together with various other entries, being before your Department on December 29, 1894, you rendered your office decision holding for cancellation this, with other, entries.

These tracts were included within the company's application to select, as per list No. 26, which was filed at the local office on October 4, 1887. The local officers refused to approve the list on the ground that the lands alleged to have been lost and used as a basis for the selection, were not situated in the Visalia land district. Subsequently the local officers at the San Francisco land office certified to the loss of said lands designated as bases, but upon presentation of this certificate the officers at Visalia again refused to approve the list for the reason that the lands designated as losses were not opposite the lands selected.

From this action of the local officers the company appealed, which, together with the list, was submitted to your office, where on April 25, 1891, your office returned the said list to the local office with instructions that the rules required indemnity to be selected from the nearest available land and that unless other reasons appeared for its rejection the list should be approved.

July 29, 1891, the local officers returned the list approved, as to the tracts therein that were shown to be free from adverse claim, and rejected, as to such tracts as had upon them existing claims under any of the public land laws. From this action the company appealed, and by your office letter of August 22, 1891, the district officers were advised that that method of acting upon lists was at variance with the rules, and list No. 26 was again returned with instructions to require a clear list to be made of the lands which the local officers would approve, and for the rejected selections, a new application and list, with tender of fees, upon which the local officers should endorse opposite each tract the reason for refusing their approval.

In accordance with these instructions the local officers subsequently transmitted rejected list No. 47 and approved list No. 38. This entry covers land embraced within the approved list No. 48, February 17, 1892.

It thus appears that the entry involved was made at a time subsequent to the filing of list No. 26, but prior to the approval of list 48, which included the lands within list No. 26.

There can be no question but the pendency of the company's appeal from the rejection by the local officers of its list to select this, with other land, operated to prevent the land from being appropriated under any of the public land laws. *Flippen v. Southern Pacific R. R. Co.* (12 L. D., 18); *Northern Pacific R. R. Co. v. Halvorson* (10 L. D., 15); and *Flippen v. Southern Pacific R. R. Co.* (14 L. D., 418).

There is no showing made by the entryman of any reason why the tract of land entered by him was excepted from the operation of the grant, but it is urged at length that, inasmuch as when the company selected Sec. 19, containing 656.16 acres, it alleged that it had lost Sec. 31, containing 640 acres and lot 1, Sec. 5, containing 16.28 acres, aggregating in all 656.28 acres, and that the record shows that lot 1, Sec. 5, was not lost to the company, and consequently can not be a proper basis for the selection of indemnity lands, a basis invalid in part is invalid as to the whole.

In the case of the Florida Central and Peninsular R. R. Co. (15 L. D., 529), it was held:

In the preparation of railroad indemnity lists each loss should be separately specified and the selection therefor designated. The difference in acreage that may exist in any case between the loss and the selection should approximate the area of the smallest subdivision.

The difference in acreage here between Sec. 19 and Sec. 31, was 16.16 acres, and under the rule laid down in the case, *supra*, it became unnecessary for the railroad company to certify, as a part of its bases, lot 1, Sec. 5, and therefore, considering that it was not lost to the company, and was not a proper portion of the bases for selection, it is sufficient to say that it was not necessary that the railroad company should have placed it in its bases. Nor do I think that it can be said that by the subsequent acts of the railroad company, which have been set out, it waived any rights that it had under its list No. 26, and the selection of the company having been finally approved, relates back to the date of the filing of the list No. 26, which was at a time prior to the making of the entry therein, and which prevented any attachment of right upon the part of the appellant.

For the reasons given the decision appealed from is affirmed.

ALIENATION—ACT OF OCTOBER 1, 1890.

MAHER *v.* HOLLINSRAKE.

An entry made in pursuance of section 1, act of October 1, 1890, is not invalidated by an agreement to convey the land covered thereby, made prior to the consummation of the transfer authorized by said act.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 26, 1896. (W. M. W.)

I have considered the case of William Maher *v.* James H. Hollinsrake, on the appeal of the former from your office decision of December 19, 1893, denying his application to contest the cash entry of said Hollinsrake for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 15, T. 58 N., R. 19 W., Duluth, Minnesota, land district.

On August 13, 1888, James H. Hollinsrake made pre-emption cash entry for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 140 N., R. 33 W., St. Cloud, Minnesota, land district. This entry was canceled for the reason that it covered land that was in the so-called second indemnity belt or limits of the Northern Pacific Railroad Company's grant and was therefore erroneously allowed, and on the 21st day of August, 1891, the entry of the land involved was made by Hollinsrake under the act of October 1, 1890 (26 Stat., 647).

On September 11, 1893, the register of the local land office at Duluth transmitted to your office an application by William Maher to contest Hollinsrake's last entry, supported by a duly corroborated affidavit. The affidavit of contest alleges in substance that said cash entry made by Hollinsrake was not made for his own exclusive use and benefit, but that he sold his right to make entry to Israel E. Linnell, April 10, 1891, long before his entry was made; that Linnell transferred one-half of his interest to one George Lange, on condition that Lange relinquish a homestead on the tract, so that Hollinsrake could make entry therefore that neither Linnell nor Hollinsrake ever contemplated that the latter had any interest in the land, and all acts were done for the sole benefit of Linnell.

Maher's application was accompanied by a certified copy of an affidavit made by Hollinsrake, in which he set forth, in substance, the facts respecting his pre-emption cash entry at the St. Cloud land office, *supra*; and that on the 10th day of April, 1891, he sold all his right, title and interest in and to the lands embraced in said entry to Israel E. Linnell. He further stated:

That at the request of said Linnell and by the terms of said agreement, I agreed with him to place said certificate No. 18,382 upon any land said Linnell might select for his said Linnell's sole and special benefit: that I did on or about the 19th day of August, 1891, at the request and upon the order of said Linnell, come to the Duluth land office and place said certificate No. 18,382 on the following described land, to wit: the east half ($\frac{1}{2}$) of the southwest quarter, and the north half of the southeast quarter of section fifteen, town fifty-eight north, range nineteen west, Duluth land

district, and on the same day did give to said Israel E. Linnell and George Lange a warranty deed to the above described lands; that I never in any way, manner or form authorized said Linnell to look up lands for my special benefit, whereby I might receive full value for my final certificate on any lands; that said Linnell contracted and paid me for above transfers in Dakota; that all I received from said Linnell, or from any person for my final certificate was the sum of seventy-five dollars, and the expenses and cost of proving up.

On the 1st day of October, 1890, Congress passed an act "for the relief of settlers on Northern Pacific Railroad indemnity lands," the first section of which is as follows:

That those persons who, after the fifteenth day of August, in the year of our Lord eighteen hundred and eighty-seven, and before the first day of January, in the year eighteen hundred and eighty-nine, settled upon, improved, and made final proof on lands in the so-called second indemnity belt of the Northern Pacific Railroad Company's grant under the homestead and pre-emption laws of the United States, or their heirs, may transfer their said entries from said tracts to such other vacant surveyed government land in compact form and in legal subdivisions, subject to entry under the homestead and pre-emption laws, as they may select, and receive final certificates and receipts therefor, in lieu of the tracts proved up on in said belt by the respective claimants: *Provided*, That such transfer of entry shall be made and completed within twelve months from the date of the passage of this act, and be so made in person by the claimant, or in case of death by his legal representative, and without the intervention of agent or attorney.

The second section provides a remedy for good faith settlers on said lands who for any reason other than voluntary abandonment failed to make proof thereon.

On the 7th of November, 1890, the Department issued a circular under said act (11 L. D., 435), in which *inter alia* it was said:

The right given is personal, and cannot be transferred, nor can the transfer provided for in the act be made through the intervention of an agent or attorney.

If the entry sought to be assailed by Maher is covered by the act of 1890, *supra*, it will fall under section 1 thereof.

Maher's affidavit of contest seems to rest upon the theory that the agreement of Hollinsrake to convey the land in question prior to the consummation of the transfer under the act of Congress was such an act as would in law avoid the entry. If this claim is well taken, then the contest should have been allowed; if it is not well taken, then the holding of your office was correct and should be affirmed.

The act of 1890, *supra*, is clearly remedial in character. All such laws are to be liberally construed so as to effectually accomplish the remedy intended to be given. 23 Am. and Eng. Enc. of Law, Subject Statutes 414, 416; Endlich on Interpretation of Statutes, Sec. 103; Sutherland on Statutory Construction, Sec. 410; Potter's Dwarrris, p. 231; Sedgwick on Construction of Statutes, page 309, where it is said:

So again it has been said that in the case of a remedial act everything is to be done in advancement of the remedy that can be given, consistently with any construction that can be put upon it.

Section 1 of the act under consideration provides a remedy for such persons as had completed entry by making final proof, payment, etc.,

of lands situated within the second indemnity belt of the Northern Pacific Railroad Company's grant. Hollinsrake had so completed his entry of the lands at the St. Cloud local land office. Such remedy consists in allowing such settlers to

transfer their said entries from said tracts to such other vacant surveyed government land . . . as they may select, and receive final certificates and receipts therefor, in lieu of the tracts proved up on in said belt.

It fixed the time within which the transfer is required to be made, and required the transfer to be "made in person by the claimant . . . and without the intervention of agent or attorney." Each of these requirements is shown to have been complied with by Hollinsrake in transferring his former entry to the one now in question.

Hollinsrake had conveyed the land covered by his first entry to Linnell, and when the right which he held from the government to it failed, Hollinsrake agreed to exercise his right of transfer under the act of Congress, and after that time convey the land to which the transfer was made to Linnell. This was not a sale by Hollinsrake of his *right* to make the entry in question, but an agreement to convey the *land* after the transfer had been completed by an entry. The evident purpose of the act was to place those who were entitled to make transfers of their entries, and who actually made and completed such transfers, in precisely the same position as they occupied under their original entries. In this case, if the first entry of Hollinsrake, which the government land officers allowed him to make and received his money for, had not failed, he would have had the right to sell and convey the land covered thereby. His right under it having failed, by the act in question Congress undertook, upon the conditions named, to place him and like entrymen in the same position with respect to the entry consummated by the transfer as he would have occupied under his first entry had it not failed. Hollinsrake substantially complied with all the provisions of section 1 of the act of 1890, which allowed the transfer of his entry to the tract in question, and his entry was properly transferred to it.

The allegations of the affidavit of contest were clearly insufficient to warrant a hearing thereon. Your office decision denying a hearing is accordingly affirmed.

PRACTICE—NOTICE OF CONTEST—SERVICE.

NICHOLS ET AL. v. PARKS.

It is incumbent upon one who files an affidavit of contest to look after the notice issued thereon, and secure due service thereof on the contestee.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 26, 1896. (G. C. R.)

Frank J. Albright has appealed from your office decision of January 8, 1895, which affirms the action of the register and receiver, allowing

W. H. Nichols to apply for a new notice of hearing upon his contest affidavit, alleging abandonment, against homestead entry made July 8, 1893, by Emma Parks, for the SE. $\frac{1}{4}$ of Sec. 5, T. 115 N., R. 5 W., Watertown, South Dakota.

The issue in this case is between two contestants, and involves the question as to which of the two is entitled to the first hearing—upon affidavits alleging substantially the same grounds against the entryman—namely, abandonment.

W. H. Nichols filed his affidavit of contest against said entry January 10, 1894. On that day, notice was issued by the register and receiver fixing February 21, 1894, as the date of hearing before the local office.

The following day (January 11, 1894), Frank J. Albright filed his affidavit of contest against the same entry. This affidavit was received "subject to contest of W. H. Nichols."

On the day fixed for the hearing on Nichols' contest (February 21, 1894) there was no appearance for either Nichols or Parks and the contest was dismissed for default. Two days thereafter (February 23) notice was issued on Albright's affidavit, fixing April 23, next following, for the hearing at the local office.

On March 20, 1894, Nichols filed a motion to reinstate his contest, alleging the fact of his filing the affidavit and that—

on said 10th day of January, 1894, a notice of contest was issued out of said office by said office and that the notice contained the date of February 21, 1894, at 9 o'clock in the forenoon of that day for the time of hearing of your petitioner's contest.

That the records of the local office show that Messrs. Mullette and Case appeared as his attorneys, but that as a matter of fact he was not then represented by any attorneys and had not then retained counsel and did not appear by attorneys.

That when he filed his said affidavit of contest he inquired of the then register (Frank J. Phillips), when the hearing on his contest affidavit would take place, and in response to that inquiry, he was told that it would be had "sometime during the month of March, 1894."

That "no notice of contest has ever been delivered to or served upon your petitioner." That he had no knowledge that a time had been fixed for the hearing or that notice had been issued or that his contest had been dismissed until March 19, 1894—when he was so informed by the receiver.

That he had been ready at all times to furnish proof on his contest, and that he had been waiting all the time since filing his contest affidavit for a notice of the time of hearing that he might serve notice on claimant; that he was in good faith etc., and he asked that his contest be reinstated, the order of dismissal vacated and the proceedings on Albright's contest be suspended and held subject to that of petitioner etc.

Upon filing this petition, Albright was cited to appear April 23 (being

also date fixed for hearing on his contest affidavit) and show cause why Nichols' motion should not be granted. Parks, who had received personal notice of Albright's contest, made default, and testimony was taken on Albright's charges, showing that the entryman had never resided on the land. Action was suspended, however, to await the result of Nichols' motion.

Upon the question at issue, raised by Nichols' motion as to which of the two was entitled to precedence in the contest, it was shown that Mullette and Case were entered of record as attorneys for Nichols, and the receiver reported that notice of January 10, 1894, on Nichols' affidavit, was delivered to said attorneys.

Attorney Case, who was present at the hearing, testified that he drew Nichols' contest affidavit, and so far as he knew the notice of the hearing was not received by his firm—certainly not by him, but that it was possible his partner (Mullette) received it. That after the contest affidavit was drawn, his firm was not engaged to do any further work in the case.

Nichols testified that he never received any notice of the contest after the affidavit was filed and never knew that any notice had issued; that he first heard the contest was dismissed about March 18, 1894; that he had no attorney to appear for him, but was told by the register that "I would have notice served on me in time for appearance."

Upon these facts, the register and receiver decided that Nichols' contest should be reinstated and Albright's held "subsequent thereto and subject thereto."

Your office in the decision appealed from affirmed that action.

Practice Rule 60 provides that "Contestants must give their own notices and pay the expenses thereof." It is no part of the duty of the register and receiver to serve notices issued upon contest affidavits; Nichols in this case filed his affidavit January 10, 1894, upon which, and on the same day, notice was issued by the register and receiver to the defendant fixing February 21, following, for the hearing.

At this stage of the proceedings, the duties of the register and receiver were at an end. Forty-two days then intervened before the day set for the hearing, and eleven days were given contestant in which to make service upon the defendant.

If contestant was in good faith and exercising ordinary diligence, he certainly had plenty of time to get the notice from the local office and make the required service. The notice was issued the very day he personally filed his contest affidavit, and he gives no reason why he did not then take it. He says he had no attorney, and that the register told him the hearing would take place about March 15, 1894; yet he did not visit the local office or make any inquiries about his contest until March 19, 1894, and then he heard for the first time that the contest was dismissed, although he knew long before that that Albright had also filed a contest. He waited sixty-seven days before he made

any inquiry at all as to the status of his contest, when he knew (the register having so informed him) that his contest affidavit had been received and notice would issue thereon.

He swears that the register told him he would have notice served on him "in time for appearance" but it nowhere appears in evidence that either of the local officers ever agreed to mail to him the contest notice, and that alone was all he needed to advise him of the time fixed for the hearing.

If he failed (having no attorney) to get the notice on the day of the issue, when he had the opportunity, or if he failed immediately to communicate with the local officers and ask for its transmission to him, or better still, go and get it, he has no one to blame but himself. His failure is due solely to his own indifference or negligence in failing to get the notice which he knew was to be issued; admitting that the notice was by mistake sent to his present attorneys (and even this is denied) still, this would not excuse him, for he then knew he had no attorney, and therefore could not have anticipated that the attorneys and not himself would get the notice.

When one files a contest affidavit against an entry, it is incumbent upon him to look after the notice issued upon such contest. He is the plaintiff to the action, initiates it, secures the notice, and serves it or causes it to be served.

In the case at bar the local officers performed their full duties when they issued the notice; and when on the day fixed for the hearing Nichols made default, and his contest was for that reason dismissed, it was proper to consider Albright's affidavit, then filed, and issue notice thereon.

This was done. Albright proved his allegations and is entitled to the preference right of entry. He will be so notified. The decision appealed from is reversed.

SECOND HOMESTEAD ENTRY—ADVERSE CLAIMANT.

BENONI R. HARRINGTON.

One who makes a homestead entry and then learns of a prior adverse settlement claim, and in fear of personal violence on the part of the adverse claimant, relinquishes his entry in good faith, and without compensation, may be permitted to make a second entry.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 26, 1896.* (W. A. E.)

Benoni R. Harrington has appealed from your office decision of December 18, 1894, rejecting his application, filed October 18, 1893, and transmitted with favorable recommendation by the register and receiver, to make second homestead entry to cover the SW. $\frac{1}{4}$ of Sec. 24, T. 21 N., R. 3 W., Enid, Oklahoma, land district.

It appears that on September 29, 1891, Harrington made homestead

entry at the Oklahoma, Oklahoma, land office, for the NE. $\frac{1}{4}$ of Sec. 28, T. 13 N., R. 4 E., which entry he relinquished January 23, 1892, and on July 16, 1892, one James Reed made homestead entry for said tract.

Harrington alleges in two affidavits filed with his application that at the time he made his original entry he was residing at Oklahoma, Oklahoma; that one James A. Walker came to him and offered to sell him a claim upon which he (the said Walker) had made settlement and improvements; that he was informed by Walker that there were no adverse claims to the land; that affiant had known Walker for some time and had confidence in his statements, and as the tract was fifty miles distant from Oklahoma City, he made entry therefor without first inspecting it; that soon after he hired one G. L. Smith to haul lumber on the land with which to build a house, and that a house was built thereon at a cost of \$70.00; that he afterwards discovered that one James Reed claimed the land by virtue of prior settlement; that Reed ordered affiant off and threatened violence to him; that affiant investigated the claim of prior settlement and found that Reed had settled on said tract prior to September 29, 1891; that affiant was informed that the best thing he could do would be to relinquish his entry, which he did on January 23, 1892, receiving no compensation or consideration whatever for so doing.

In support of Harrington's statements are the affidavits of G. L. Smith, who swears that he was present when Reed made threats against Harrington, and J. E. Bell, who swears that in the month of October, 1891, he was on said tract and saw James Reed tear down and burn the improvements placed thereon by Harrington and heard him threaten violence against the said Harrington if he ever came back on the land.

In the case of Jackson C. Brown, 8 L. D., 587, a second entry was allowed where the first was relinquished under the belief that it could not be maintained without danger to the entryman's life.

In the case of Charles Wolters, 8 L. D., 131, the right to make a second entry was accorded where the first, for equitable reasons, was relinquished in good faith on discovering that the land embraced therein was covered by the settlement right of a prior pre-emptor, who, on account of poverty, had been unable to submit his final proof within the statutory period.

Harrington showed some negligence in not inspecting the land before making entry therefor, but this may be excused by the distance of the tract from the land office, near which he was residing; the notorious rapidity with which vacant claims in that district were taken up by home seekers; his long acquaintance with and confidence in Walker; and the absence of any valid reason for supposing that the tract had already been appropriated by some one else. He showed his good faith by immediately beginning to improve the tract, but, as appears from the affidavit filed, his house was torn down and burned and he himself was threatened with violence. He might have taken the matter into court.

and maintained his right to the land at some trouble, expense, and risk to himself, but on learning that Reed had settled on the land prior to the date of his entry, he decided to withdraw peaceably and leave Reed in possession. The fact that Reed did not make entry until several months later in no way affects Harrington's good faith.

Under the circumstances, I am of the opinion that the present application should be granted.

Your office decision is accordingly reversed and Harrington will be allowed to perfect entry for the tract applied for upon his showing his present qualifications and paying the requisite fees and commissions.

PRACTICE—CONTINUANCE—SIMULTANEOUS SETTLEMENTS.

WOOD *v.* BEACH.

The discretion of the local officers in acting upon a motion for continuance will not be interfered with, if abuse of such discretion does not appear.

In a case wherein priority of settlement is the issue, any period of time susceptible of notation intervening between the acts of settlement on the part of the adverse claimants, and which is noted with sufficient distinctness to separate said acts by a recognized period, will prevent the consideration of said acts as simultaneous.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 26, 1896.* (C. J. W.)

September 19, 1893, Robert E. Beach made homestead entry No. 268, for the NE. $\frac{1}{4}$ of Sec. 35, T. 20 N., R. 1 W., Perry, Oklahoma. September 25, 1893, six days thereafter, James N. Wood filed affidavit of contest against said entry, alleging prior settlement, and on same day made homestead application and affidavit to enter said tract. December 18, 1893, the case went to trial on the issue of prior settlement. The hearing closed on January 5, 1894, and on May 22, 1894, the local officers rendered their decision, in which they found that, while Wood made settlement before Beach made entry, Beach was the first to reach and stake the claim, and was a prior settler to Wood. June 22, 1894, Wood appealed from your said decision, and on December 8, 1894, your office reversed the decision of the local officers, and directed that unless the parties agreed to terms of compromise within thirty days from notice of said decision, the tract should be disposed of to the highest bidder, as between these parties, as in cases of simultaneous applications to enter. Both parties have appealed from said decision.

It seems that on the day set for hearing the plaintiff filed a motion for continuance on the ground of the absence of a material witness. Counsel for defendant offered to stipulate that the deposition of the absent witness should be taken within sixty days, waiving all time to file cross-interrogatories, except one day, and agreeing to admit said deposition, without objections, whenever the same might be received within said sixty days, to which plaintiff's counsel objected; and thereupon the motion to continue was overruled and exception taken to the

ruling. This exception your office held to be not well taken. In Wood's appeal to your office he charged, that the evidence shows that Beach had obtained the privilege of making entry fraudulently, and out of his proper order, which charge your office found was not supported by the proof. The findings of your office as to both of these questions, Wood alleges is erroneous, and as these are the only questions presented by his appeal that are material, his appeal will be first considered.

The rules of practice are so framed as to allow registers and receivers to exercise reasonable discretion in granting or overruling motions for continuance. That discretion will not be interfered with, except in cases of abuse, and in my opinion there was no abuse of such discretion in this case, and your office committed no error in so holding. The evidence as to the circumstances under which defendant's filing was placed of record, is not sufficient to sustain the charge of fraud against said entry. As both plaintiff and defendant made settlement before said entry was made, the rights of the parties will depend upon the order of the settlement. This disposes of Wood's appeal, and brings me to the consideration of Beach's appeal.

He undertakes to specify thirty-three grounds of error, some of which are alleged to be errors of fact and others errors of law. This imposing numerical array of grounds of error are easily reducible to two propositions, viz: (1) that your office found against the preponderance of the evidence; and (2) that the specific directions given as to the disposition to be made of the land involved, is not authorized by law.

The real question, and the one which must control the case, is, does the evidence support and authorize the conclusion announced by your office, that Beach and Wood reached the tract and staked it simultaneously. If this fact be conceded, I have no doubt that the principle applicable to simultaneous application to enter could be applied with equal propriety to cases of simultaneous settlement, where priority of settlement is the issue. Your office and the local officers reached different conclusions as to what was shown by a preponderance of the evidence. The local officers say:

The race made to the land in controversy on September 16, 1893, was a short one and a fast one. The time embraced in running from the starting point was less than a minute, the distance being about fifty-nine rods. Both contestant and contestee seem to have ridden swift horses, and the time of staking by each must have been necessarily close. As we are of the opinion that each followed up his staking by residence and substantial improvements within a reasonable time; that the segregation thereof from the public domain was sufficiently indicated by each, and that said segregations and settlements were unquestionably prior to defendant's entry by filing, the question is who first entered upon and staked the land in controversy. From a close and exhaustive reading of the evidence, we are led to the conclusion, that on account of a panel of wire fence, around which Wood was bound to curve his race from his starting point, that the distance traveled by him was a little farther than that traveled by Beach, who ran due north to the land and had no curve to make. Both started from points on the south line of fraction south of the claim in controversy and equally distant from the south line of the claim, consequently, the curve

around this panel of fence must have delayed Wood for a second or two in his race, and a second or two, the shortest of time, is to our minds, the essence of this cause. We think the preponderance of the evidence establishes the fact, that Beach was first on the land and to stake.

Your office differs from the local officers in the conclusion reached, and in substance finds that the evidence leaves the fact in doubt as to which actually reached the land first, and that their arrivals should be treated as simultaneous, and an equitable division made between them, or the land sold to the highest bidder as in cases of simultaneous applications. Thus it would seem that your office makes doubt as to who was the first settler of the two in question the predicate for holding that the doubt should be solved by treating the settlements as made simultaneously. It seems to me that this is treating the case as if Beach had no entry of record, whereas your office had previously held that he had a valid one. Where the entry is to be overcome by a contestant, the burden is upon the contestant, and it is not sufficient to simply put the truth of the ground of contest in doubt. In such a case the contest must fail, and the entry remain intact. At first glance it appears that where different applications to enter, or acts of settlement, are made very nearly at the same time, they might safely be considered as simultaneously made, but such does not seem to be the rule. In the case of *Benschoter v. Williams* (3 L. D., 419), it was held that where a few seconds intervened between applications to contest, precedence must be given to the one actually received first. It would seem that where the issue is one of priority, and that priority is the basis of a legal right, any period of time susceptible of notation, and which is noted with sufficient definiteness, to sever transactions by a recognized period, will prevent such transactions from being considered simultaneous.

I think, however, that by following recognized rules of evidence, the testimony in this case will relieve it at least of legal difficulty. Of all the witnesses who testified only two claimed to have been in view of the two parties as they were about reaching the line of the tract in dispute. They only distinguished the parties as the front riders on different sides of the branch or creek. They testify very positively that the front rider on the east end of the lot, did not reach the land until after Beach had passed the line and was off his horse and setting his stake. These witnesses are Martha Morris and Mrs. Goodwill. Nothing derogatory to the character of either is shown, nor are they contradicted. It may seem strange that they saw what other witnesses did not see, but the fact remains that they swear positively, and are not contradicted, impeached or discredited. If their testimony is to be taken as true, it follows that Beach was the first to reach and stake the claim. I refer to pages 106, 107, 108 and 131 of the evidence.

It seems to me that the conclusion reached by the local officers was the proper one in the case, and your office decision is accordingly reversed and their decision approved.

STATE SELECTION—APPLICATION.

WILLIAM HERTH.

An application on the part of a State to select lands should be rejected, if the lands applied for are not open to such appropriation at the date of selection, or at the time when the application is received.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 26, 1896. (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of Sec. 28, T. 23 N., R. 7 E., Seattle, Washington, land district.

The facts as stated in your letter of August 3, 1893, to the register and receiver, are as follows:

On May 9, 1893, the official plat of the survey of the township 23 N., R. 7 E., was filed in your office and entries were received for land in the same on May 9, 1893, the list of selections by the State of Washington, under the provisions of the 17th section, act of Congress approved February 22, 1889, in satisfaction of grant to said State for the establishment and maintenance of a scientific school, was received at your office at 8:15 a. m. for land in said township on May 9, 1893; at 9:34 a. m., the said William Herth presented his timber land sworn statement for the SE. $\frac{1}{4}$, Sec. 28, Tp. 23 N., R. 7 east, and the same was refused for the reason of conflict with the said State selection.

It is also shown by the record that Herth's application was executed at the local office May 9, 1893.

On this statement of fact you affirmed the action of the local office, on the ground that the State's selection was prior in point of time. Herth prosecutes this appeal, assigning numerous errors, but I think the second sufficient for the purposes of this case: error

in holding that the selection by the State of Washington, filed in the United States land office before 9 o'clock A. M., on May 9, 1893, as shown by the records, was such a selection as would (defeat) applicant's application presented at the opening of the Land Office at 9 o'clock A. M. on May 9, 1893.

The land in question was not subject to entry until 9 o'clock A. M., the hour at which the local office is opened for business. An examination of the list of selections in your office shows that the commissioner of public lands for Washington made a certificate that on May 4, 1893, he selected the lands included in said list. This certificate is dated May 9, 1893. Inasmuch as the list of selections was received at the local office at 8:15 o'clock A. M., on May 9, it necessarily follows that the list and certificate were made prior to the time when the land was subject to entry. (*Barnard's Heirs v. Ashley*, 18 How., 46; 2 C. L. L., 1119.)

In the case of *Smith v. Malone* (18 L. D., 482), the question as to what right a party can acquire to land whose application is sworn to prior to the time when the same could be legally taken, was exhaustively gone into, and all prior decisions on the subject reviewed. It was therein decided (syllabus)—

An application to make entry of public land cannot be allowed if based on pre-
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liminary papers executed prior to the time when said land is legally subject to such application.

The reasons given in that case for the application of this rule to individuals are peculiarly applicable to the case at bar. It is true that in that case the applicant was an individual, and as such was required to show his personal qualifications to enter land at the time it was subject to entry.

By analogy the same rule should be applied to the State of Washington in making its selections. To hold otherwise gives the State an arbitrary advantage over any individual, in that under the rule the individual cannot make a legal application until the land is open to settlement or purchase.

But aside from this, the land in question was not subject to selection either at the time the application was received, or when executed; hence it should have been rejected.

The judgment of your office is therefore reversed.

RAILROAD LANDS—RESIDENCE—ACT OF JANUARY 23, 1896.

SHAFFER *v.* BUTLER.

(On Review.)

Under the amendatory act of January 23, 1896, residence is not required to be shown in support of an application to purchase forfeited railroad lands under section 3, act of September 29, 1890, if the land has been cultivated and otherwise improved.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 26, 1896.* (F. W. C.)

I have considered the motion forwarded with your office letter of April 11, 1895, for a rehearing in the matter of the case of E. B. Shafer *v.* J. M. Butler, involving the SE. $\frac{1}{4}$, Sec. 17, T. 3 N., R. 33 E., La Grande land district, Oregon.

This land was formerly included within the limits of the grant made to aid in the construction of the Northern Pacific railroad, but being opposite the unconstructed portion of that road, it was restored to the public domain by the general forfeiture act of September 29, 1890 (26 Stat., 496).

On January 22, 1892, Butler made homestead entry of the land, and on February 13 following, Shafer filed a contest against said entry in which he set up a claim of right to purchase the same under the third section of the act of forfeiture, he claiming to have settled upon said land June 2, 1890, with intention of purchasing the same from the company.

Upon this contest hearing was regularly held, and from the testimony adduced it appeared that this land was first claimed by Bluford Stanton, who occupied the lands from 1880 until he sold his improvements

and possessory claim to J. M. Elgin, who in turn sold to L. D. Shafer, the brother of the contestant.

L. D. Shafer came into possession of the land in 1888 and held the same until May 9, 1890, which he sold to contestant for \$3,000. Contestant was, at the time of this purchase, living upon other land which he had entered under the homestead laws, for which he did not make proof until after the passage of the act of forfeiture.

Upon this showing, your office decision of June 5, 1893, held the homestead entry by Butler subject to the right of purchase in Shafer, under the provisions of the third section of the act of forfeiture. Butler appealed to this Department; said appeal being considered in departmental decision of December 11, 1894 (19 L. D., 486), in which your office decision was reversed because it was not shown that Shafer was a resident upon the land, nor that he, or those before him in possession, held under deed, written contract with, or license from the company.

Motion for rehearing is based upon the ground that Stanton, through whom Shafer came into possession, settled upon this land under license from the railroad company, the rights under which were transferred to the succeeding purchasers.

Numerous objections have been filed to the consideration of this motion, but the same need not be considered in view of the act of Congress approved January 23, 1896, amending the act of forfeiture, in which it is provided that—

Section three of an Act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said act, shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimant, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

Under the laws, as amended, residence is not necessary to be shown in support of an application to purchase under the third section of the act of forfeiture, and as it was shown that this land was improved to great value by Stanton, and those succeeding in possession through him, and that the contestant settled upon the land with the intention of purchasing the same of the company, and continued the improvement and cultivation of the same and was in peaceable possession thereof at the time Butler made entry, I must recall the previous decision of this Department, and sustain your office decision according to Shafer the right to purchase under the act of forfeiture. Upon the completion of said purchase Butler's entry will be canceled.

SWAMP LAND GRANT—INDIAN RESERVATION.

STATE OF MINNESOTA.

By the terms of the proviso to the act of March 12, 1860, extending the provisions of the swamp land grant to the State of Minnesota, said grant is not operative as to any lands that prior to selection by the State have been "reserved, sold or disposed of" pursuant to any law enacted prior to said act.

It is not necessary to constitute an Indian reservation that a treaty or act of Congress shall specifically describe the lands that are reserved. It is sufficient for such purpose if the lands occupied by the Indians are recognized by the officials of the government as reserved Indian lands.

A treaty when approved is in effect a legislative enactment; and if in pursuance of a treaty with the Indians prior to the act of March 12, 1860, lands occupied by them are then regarded as reserved for their benefit, and are subsequently so treated, such lands are accordingly excepted from the operation of the swamp land grant.

The act of January 14, 1889, did not contemplate the disposition of any of the Indian lands opened to settlement thereby except in the manner, and for the purposes therein provided, to the end that the money arising from such disposal should inure to the benefit of the Indians, and it therefore follows that the claim of the State to any of such lands under the swamp grant is inconsistent with the provisions of said act.

Secretary Smith to the Commissioner of the General Land Office, March (J. I. H.) 27, 1896.

I am in receipt of your office letter of March 6, 1896, together with the letter of the governor of the State of Minnesota, dated February 14, 1896, which was referred to you, under date of February 28, 1896, for report thereon.

The governor of Minnesota claims that the swamp lands within the ceded portions of the Red Lake reservation, soon to be opened to entry, were granted to the State of Minnesota, by virtue of the provisions of the swamp land grant, made by Congress March 12, 1860 (12 Stat., 3), and asks that

such lands be excluded from the lands to be opened to entry, and that the surveyor general of the State be instructed to select the same for and in behalf of the State, as in other cases.

I have carefully examined the claim of the State of Minnesota.

The swamp land grant of September 28, 1850 (9 Stat., 519), was a grant *in presenti* of all such lands as had not been sold by the United States.

The act of March 12, 1860 (12 Stat., 3), extended the act of 1850, to the State of Minnesota with further exceptions contained in a proviso. The last named act is as follows:

That the provisions of the act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits,' approved September twenty-eight, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon: *Provided*, That the grant hereby made shall not include any lands which the government of the United States

may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

It is under this act that the State of Minnesota claims swamp lands within the ceded portions of the Red Lake reservation.

The proviso to this act means, that if, when the State of Minnesota applies for an approval of its selection of swamp lands, any of the lands so selected have been reserved, sold, or disposed of pursuant to any law enacted prior to March 12, 1860, the grant to the State will not attach to such lands.

It is claimed by the State of Minnesota that this proviso to said act is void, because the same is repugnant to the purview of the act. The decision by the supreme court of Oregon in the case of *Gaston v. Scott* (5 Oregon, 48), is relied upon in support of this contention.

I can not consent to this constriction of the act of 1860, *supra*. The act must be construed, if possible, so as to carry out the intent of Congress. This intent is, I think, very clear; that is, to grant to the State of Minnesota swamp lands within her borders that had not been, prior to selection by the State and approval by the Department, disposed of, or reserved, under some act of Congress made prior to said granting act. Although this exception to the grant is contained in a proviso, that fact does not render it any the less an exclusion of such lands. Such exclusion may be made by a proviso, a saving clause, or by any words placed anywhere in the body of the act, from which the intention of Congress may be understood; the object, or purpose, being simply to exclude from the body of the act certain lands not intended to pass by the grant to the State.

It is further claimed by the State of Minnesota, that these lands do not come within the proviso of said act, and in support of this contention it is insisted, that in order to bring these lands within the meaning and intent of the proviso they must have been set apart as a reservation by metes and bounds, and called such, under some act of Congress especially authorizing them to be so reserved.

I cannot concur in this view of the subject.

The Indians who inhabit what is known as the Red Lake reservation, are a portion of the Mississippi Chippewa Indians, who, with other Indians, owned vast tracts of country in the Northwest, which was minutely described in a treaty with the United States. They made treaties from time to time with the United States, ceding portions of their lands and reserving other portions. In every one of such cessions the lands ceded were minutely described, and the boundaries of the land which the Indians retained became, in this way, as distinctly described and marked as were the lands which they ceded.

It is not necessary in order to constitute a reservation that a treaty, or act of Congress, shall specifically mention the lands that are reserved, but it is sufficient if the lands occupied by the Indians are recognized

by the officials of the government as reserved Indian lands. Upon this point the supreme court recently decided in the case of *Spalding v. Chandler* (160 U. S., 404), that—

If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

The next question which arises is: Were these lands reserved for the Indians pursuant to law enacted prior to the passage of the act of March 12, 1860, *supra*?

I think this question should be answered in the affirmative. A treaty when approved is in effect a legislative enactment. The United States made several treaties with the Indians inhabiting the north-west country, prior to the act of March 12, 1860, *supra*, for cessions of portions of their lands, and the portions not ceded were reserved to the Indians by such treaties as effectually as if the treaties had specifically designated such lands as reservations for the Indians. Pursuant to these treaties the United States established Indian agencies for them, and treated the lands in all respects as Indian reservations.

The Chippewas of Red Lake since 1849 have been under the control of an Indian agent, and have been treated by officials of the government at all times as reservation Indians. The Department for years before March 12, 1860, treated these lands as the Red Lake reservation, and Congress very frequently so designated them in appropriation acts.

Thus it will be seen, that for years prior to the act of March 12, 1860, the lands of Red Lake were distinctly bounded; the lands were treated as reserved Indian lands; the Indians were treated as reservation Indians, and all done pursuant to treaties with said Indians.

In the sixth article of the treaty with the Red Lake Chippewas, ratified May 5, 1864, these lands are referred to as a reservation, and the President was required to appoint a board of visitors for the reservation. This treaty did not create a reservation for the Indians, but treated it as an existing reservation under the authority of law.

I therefore agree with your office decision that the lands had been reserved for the Indians pursuant to a law enacted prior to the swamp land grant to the State of Minnesota, and that none of said lands passed to that State under said grant.

The application of the State of Minnesota to have patented to her these lands, under the act of 1860, *supra*, can well be denied on another ground. These lands were originally Indian lands, to no part of which the title had been extinguished. The lands were open to settlement under an agreement made pursuant to an act of Congress approved January 14, 1839 (25 Stat., 642). Said act authorized an agreement with the Indians for the cession of these lands, expressly providing

that the agricultural lands shall be disposed of to homestead settlers at a price therein fixed, and that the timber lands shall be sold at an appraised value, and that the money arising from homestead entries and the sale of what is known as the timber lands, shall be placed in the Treasury of the United States to the credit of the Chippewa Indians in the State of Minnesota, as a permanent fund.

It may well be doubted if the opening of these lands for settlement and the offering of them for sale, as provided for in said act of Congress, placed them in the category of public lands in the sense in which that term is ordinarily used. They did not become public lands of the United States in any sense except for disposition in the manner pointed out by the act of Congress and agreed to by the Indians, and the United States, as trustees for the Indians, declared them to be public lands for the purpose of carrying out the consent of the Indians to dispose of them. This point is further strengthened by a consideration of the fact that after Congress provided, in section 4 of said act, for the appraisement and sale of the pine lands, it declares, in the last paragraph of that section, that:

All other lands acquired from said Indians on said reservations, other than pine lands, are for the purposes of this act termed "agricultural lands."

Thus making an express declaration, as to the character of said lands, to be accepted by this Department as its guide in disposing of the same.

It cannot be doubted that Congress might have authorized the Indians to dispose of the agricultural lands to such persons as might come in and settle upon them, and to sell the timber lands to such persons as might wish to buy, and the settlers and purchasers would thereby acquire a perfect title to said lands; that is, the ultimate fee that the United States claimed, and the right of occupancy—the title—of the Indians. The disposition of the lands under the act of Congress of 1889, *supra*, seems to be in nowise different in effect from the disposition above suggested, for the United States consents that the Indians may have the full benefit of these lands; that is, the ultimate fee as well as the right of occupancy.

Congress was aware of the status of these lands; their ownership by the Indians, the history of the Indians, and their occupancy of said lands, and I cannot believe that it was the intention of Congress to extinguish the Indian title so as to make them public lands in the sense that they might be taken for any other purpose than that specified in the act.

RAILROAD LANDS—REHEARING—SOLDIERS' DECLARATORY STATEMENT.

CULLOM *v.* HELMER ET AL.

The preferred right to make a homestead entry of forfeited railroad lands is conferred by section 2, act of September 29, 1890, upon settlers in good faith on such lands at the date of the passage of said act.

In case of a rehearing ordered by the Department the evidence should be confined to the issue as defined in the departmental order.

A soldier's declaratory statement received through the mail should not be allowed. The case of *Wickstrom v. Calkins et al.*, 20 L. D., 459, overruled.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 27, 1896.* (J. L.)

This case involves the west half of the NE. $\frac{1}{4}$ and the east half of the NW. $\frac{1}{4}$ of section 13, T. 48 N., R. 9 W., Ashland land district, Wisconsin.

Said tract was within the limits of the grant to the Wisconsin Central Railroad Company, under the act of May 5, 1864, and was forfeited to the United States and restored to the public domain by the act of September 29, 1890 (26 Stat., 496), and was thrown open to entry at the local land office on February 23, 1891.

On said day, February 23, 1891, the local officers received by mail three papers purporting to be Clement C. Williams's soldier's declaratory statement for the NE. $\frac{1}{4}$ of said section 13, selected by Owen A. Bryant as agent of said Williams.

On the next day, February 24, 1891, Charles Helmer made homestead entry No. 2196 of the NW. $\frac{1}{4}$ of section 13.

On the same day, February 24, 1891, Marcus B. Cullom filed his application (with tender of fees etc.) to make homestead entry of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 13, alleging:

That I settled and established a residence on the land described in my application herewith, on the 5th day of September 1888, which I have maintained ever since; and I now claim a preference right to make said entry under the second section of the act of Congress of September 29, 1890, under which said land is opened to entry.

The local officers rejected said application by a letter to Cullom in the following words:

ASHLAND, WIS., *February 24, 1891.*

SIR: Your homestead application to enter the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 13, T. 48 N., R. 9 W., is hereby rejected by us for the reason, that said lands have been entered by soldier's declaratory statement No. 77 of Clement C. Williams, and homestead entry No. 2166 of Charles Helmer; and you are hereby notified that you have thirty days from date of this notice in which to apply for a hearing to determine your rights to said land.

Two days afterward, on February 26, 1891, Cullom filed his affidavit of contest against Williams and Helmer and therein alleged:

That this contestant on the first of September 1888, established a residence on the land embraced in said entry of said defendant Helmer, and the filing of said defend-

ant Williams; and has maintained the same in good faith ever since that date; and that his improvements on said land are reasonably worth \$350: That on February 24, 1891, this contestant offered his homestead application for said land at the United States Land Office at Ashland, Wisconsin, under the 2nd section of an act of Congress approved September 29, 1890, and section 2289 of the Revised Statutes of the United States; which said application was rejected because said land was appropriated by the entry of said defendant Helmer, and the filing of said defendant Williams: That neither of said defendants, Helmer or Williams, has ever settled on said land or made any improvements thereon; and the entry of the said Helmer, and the filing of the said Williams, are in conflict with the preferred right of this contestant to make a homestead entry thereon under the acts of Congress aforesaid.

After hearing, at which all the parties were present, the register G. W. Carrington, and the receiver R. C. Heydlauff, jointly found for the contestant, and recommended that Williams's filing and Helmer's entry should be canceled.

Williams and Helmer both appealed. On January 16, 1892, your office affirmed the decision of the local officers; and Williams and Helmer appealed to this Department.

While the appeal was pending here, Henry Brace, a special agent of your office, under instructions dated March 17, 1892, made a report to your office in which he recommended that Cullom's application to make homestead entry be rejected.

On November 29, 1892, this Department, after expressing the opinion that your office decision was justified by the record, referred to said special agent's report, and thereupon ordered a new hearing between the parties, at which the government should be represented by a special agent. A motion for a review of said decision was overruled on March 2, 1893; and the purpose and scope of the rehearing were distinctly stated.

The new hearing began May 10, and ended June 2, 1893. On June 24, 1893, the local officers (H. L. Besse register and R. C. Heydlauff, receiver) found for the defendants; and recommended that Cullom's contest be dismissed, and that Helmer's entry and Williams's filing be held intact.

These two officers (Besse and Heydlauff) were shortly afterwards removed from office by the President upon the recommendation of the Commissioner of the General Land Office "for corruption and fraud in their official duties;" and G. E. Kuntz and Clarence Dennis were appointed to succeed them.

On July 20, 1893, Cullom filed with the new local officers a motion for a rehearing of the decision of June 24, 1893, and sundry affidavits in support thereof. On October 11, 1893, said motion was sustained, the decision of June 24, 1893 was vacated and set aside, and another hearing was ordered, which took place on December 18, 1893. And on March 10, 1894 the local officers (G. E. Kuntz, register and Clarence Dennis, receiver) found for the contestant, and recommended that Helmer's entry be canceled as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 13, that Williams's filing be canceled as to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 13,

and that Cullom's application to make homestead entry of said tracts be allowed.

From said decision Williams and Helmer appealed. And on May 19, 1894 your office reversed the decision appealed from, and dismissed Cullom's contest.

Cullom's appeal from your office decision brings the whole case before this Department for final adjudication.

The testimony (which covers nearly six hundred pages of type-written foolscap paper), by a clear and palpable preponderance proves the following facts:

In the year 1888, Marcus B. Cullom was thirty three years old, had been a dentist for twelve or thirteen years, and was then practicing his profession in partnership with one of his brothers, in St. Paul, Minnesota, where he resided. His father and mother, two brothers and two sisters had died of diseases of the lungs. He also was attacked with the congenital malady and had hemorrhages. His physicians told him that he could prolong his life, only by living in the open air; and especially recommended him to go into the pine woods. Whereupon he sold to his partner his interest in and the good will of the dental business, broke up his home and abandoned his residence in St. Paul; and in the month of May, 1888, went into the pine forest of Wisconsin to find a homestead and establish a home. It was part of the consideration of the bargain and sale aforesaid, that his brother should be permitted to continue the dental business under the old name, and that he (Marcus), should give the business such supervision as time and health and habitual absence might permit, and that his brother would pay him the sum of twenty five dollars per month therefor.

On July 2, 1888, Marcus B. Cullom selected the tract of one hundred and sixty acres which he now claims as his homestead, and made his settlement thereon. With the help of employes, he ran the lines, cut logs and laid the foundation of his house, and marked the site of the house, and corners of the land, and places where trails crossed the lines, with boards and blazed trees, on which he wrote distinctly his name, a description of his claim, and the date of his settlement; and he then and there told friends and neighbors present, that he took said tract as his homestead and place of residence. He remained during the summer, doing such slashing, clearing and seeding as his health and strength would permit. In the fall of the year, with the help of four other men, he built his house about fourteen feet square, six or seven feet high, with scoop roof and puncheon floor, with door and window and glazed sky-light. When winter came with deep snow and low temperatures, he visited his brother in St. Paul, and did such work as came to hand, especially gold work in which he was proficient. In the spring of 1889, he returned to his home in the pines, and spent the summer there, slashing and clearing and planting, opening a road and trails and improving his house. During that year, his brother established in

Duluth, a branch of his dental business in charge of Dr. S. R. Holden, a practical dentist, to be conducted under the old firm name, with such supervision as Marcus might be able to give on occasional visits from his home in the pines, about forty miles distant by railroad. When winter came again he went to Duluth, and spent considerable time, doing dental work occasionally, sleeping generally in his brother's dental offices, and getting his meals at hotels and restaurants. During the winter of 1889-90, he frequently returned to his home, which he had left in charge of a neighbor, whom he supplied with provisions. In the spring of 1890, he returned to his homestead; and after that time, (with the exception of a week spent in St. Paul and Minneapolis about the fourth of July, a week spent in a hospital at Duluth, and a week or ten days about Christmas time spent in St. Paul and Minneapolis), he remained constantly on the land until July, 1891. On September 29, 1890, he was an "actual settler in good faith" present in person on the land in contest; and he was such settler in February 1891, when he filed his application to make entry and initiated his contest at the Ashland land office; and also in May, 1891, when the first hearing of this case was had there.

During the years 1888, 1889, and 1890, Dr. Cullom frequently visited his neighbors, and they visited him, exchanging hospitalities. He was known and recognized by them all, as a *bona fide* settler and actual resident, sharing and promoting their common interests. In January 1889, they sent him and Mr. Robrer (an educated lawyer who had settled in the neighborhood), to Washington, D. C., to get information, and to promote the restoration of the lands to the public domain, and to secure protection of the settlers.

There can be no doubt that the first decision of the local officers and that of your office confirming the same, were clearly right. Cullom was granted by the second section of the act of September 29, 1890, a preference right to make homestead entry of the land in contest. And nothing has been developed in the subsequent proceedings to forfeit or impair that right.

The rehearing ordered by this Department on November 29, 1892, was strictly limited by the departmental decision of March 2, 1893, to the determination of the only issue in the case, to wit: Whether Cullom was or was not on September 29, 1890, an actual settler in good faith. Secretary Noble said: "It simply institutes inquiry as to whether he was a settler; and if he was, his right will not be defeated." All testimony taken upon the rehearing not relevant to this simple, single issue, must be disregarded.

The report of Special Agent, Henry Brace, was not justified by the affidavits filed with it, and it is not legal evidence in this case. He was examined as a witness at the rehearing. It appeared that he had procured for his son employment as a clerk with the corrupt register and receiver aforesaid, and that he was himself on intimate terms with

them. His cross-examination, and the contradicting testimony of other witnesses, discredited his testimony and his report.

The findings of Register Besse and Receiver Heydlauff, were palpably contrary to the evidence in the record before them. Register Kuntz and Receiver Dennis, were clearly right in setting aside their decision and awarding a rehearing. They called the attention of Special Agent F. W. Worden to Cullom's application for a rehearing, and told him that they were considering the propriety of granting it. And by letter of August 31, 1893, Worden notified your office thereof, and protested against it.

The order granting the rehearing was made on October 11, 1893. On December 18, 1893, the day set for the rehearing, Williams and Helmer, both appeared by their attorneys, and filed motions to "dismiss the rehearing"; and protested against the introduction of any evidence, and against the rehearing. Said motions and protests being over-ruled, the attorneys left, and Cullom proceeded with his witnesses.

Williams and Helmer had due notice of said rehearing; and they have not complained that Special Agent Worden was not notified of the time and place set therefor. This omission may be waived by the government which was represented at the hearing by the local officers.

It appears that on the second day of December 1891, Cullom was in Washington City, looking after his case which was pending in your office on appeal. On that day, in order to speed the cause, he filed an affidavit in which he stated that:

In September 1891 while the forest fires were raging in northern Wisconsin, Helmer set fires running on my claim, burning down, deadening, or damaging all of my valuable timber. Such damaged timber threatens to be a total loss unless properly cared for.

The testimony shows that Cullom had reason to believe and did believe, that all the statements contained in said affidavit were true; and said statements have not been successfully contradicted. But whether true, or untrue or exaggerated, they are wholly irrelevant to the issue in this case.

Your office erred (1) in holding that "it was entirely competent at the hearing ordered by the departmental decision of November 29, 1892, to inquire into the matter of his residence on the land since the initiation of this contest;" (2) in finding that Cullom "was not an actual resident on the land since July, 1891"; and (3) in deciding that "Cullom's prior right at the date of the initiation of his contest, was forfeited by his absence from the land."

The testimony by a clear and palpable preponderance proves, that in July, 1891, after service of the appeals from the decision in his favor, Cullom employed a neighbor whom he furnished with provisions, to stay on his homestead, take care of his property, keep up his cultivation, harvest his crops, and receive the friends who might come to see him. Cullom then went to Duluth, to his brother's dental offices,

sought and obtained professional employment, and made and saved money enough to pay his expenses to Washington, D. C., to attend to his case before the General Land Office. During that visit to Duluth he frequently returned to his homestead and spent short periods of time. He went to Washington and stayed three months and procured from the Commissioner an order making his case "Special." In December, 1891, he returned to his homestead. On January 16, 1892, the Commissioner affirmed the decision in his favor, and his adversaries appealed to the Secretary. Cullom again visited Duluth, sought and obtained professional employment, and made and saved money where with to support himself, keep up cultivation and improvements on his land, and defend his rights; still employing a man to remain upon and take care of his homestead, and frequently returning to his home, and keeping up his intercourse with the neighbors. So well known was he as an actual settler and resident in good faith, that in the year 1892 a caucus of his friends and neighbors held in the town of Iron City, invited him to become their candidate for the legislature of Wisconsin. And Henry Brace, (who immediately after making his report aforesaid resigned his office as special agent, and went into business as a cruiser, inspecting and estimating the value of timber lands and locating settlers), offered to vote for him if he would consent to be a candidate.

It is proved, that after July, 1891, and until the day of the rehearing in May, 1893, and since, Cullom did and has done everything that a man in his condition and circumstances could be expected or required to do, to defend and maintain his actual residence upon his homestead; and that all his absences from the land are satisfactorily accounted for.

In the case of Williams, his soldier's declaratory statement should have been rejected, and should now be canceled, because it was sent by mail. The tract was selected by an agent, but the application was not accompanied by the power of attorney alleged to have been executed by Williams. See letter of April 14, 1874, (1 Copp's Land owner 20), Circular of April 13, 1892, (20 L. D., 7-10), and *ex parte* Phillip Casey (21 L. D., 551). In the case of Wickstrom *v.* Calkins, (20 L. D., 459) the decision was erroneous, and it is hereby overruled.

In the case of Helmer it is proved that he had full notice of Cullom's settlement, improvements and residence, and of the boundaries of his claim, several days before he made entry of part thereof on February 24, 1891.

For the foregoing reasons your office decision is hereby reversed. Williams's declaratory statement will be canceled as to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Helmer's entry will be canceled as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of section 13 aforesaid, and Cullom will be allowed to make homestead entry of both of said tracts.

RELINQUISHMENT—REINSTATEMENT—INTERVENING CLAIM.

DAVISON *v.* ALTON ET AL.

An entryman who executes a relinquishment and delivers the same to a creditor to secure the payment of a debt, is not entitled to reinstatement, where it appears that said relinquishment was filed on account of the non-payment of the debt, and the rights of third parties have intervened.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 27, 1896. (G. C. R.)

Nannie J. Osborne has appealed from your office decision of December 10, 1894, which affirms the action of the register recommending that her application for a reinstatement of her timber-culture entry, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 23, T. 30 N., R 22 W., Valentine, Nebraska, be denied, and the application of William M. Davison to make homestead entry of the same land be allowed.

Mrs. Osborne made entry of said land August 9, 1881; on July 11, or 12, 1889, she executed and delivered to Charles G. Alton, cashier of the First National Bank of Ainsworth, Nebraska, a relinquishment of her said entry. On March 1, 1890, about eight months after the relinquishment was executed, Alton filed the same in the local office, and thereupon made timber-culture entry, No. 8234, for the land.

On December 1, 1892, William M. Davison initiated a contest against Alton's entry, alleging "failure to break or cause to be broken or plowed five acres of said tract during the second year of entry," and that "no trees are now growing upon said tract, and that he has not cured his laches."

Hearing was ordered for February 25, 1893. Upon the day so fixed, Davison appeared and presented Alton's relinquishment, and made application to make homestead entry of the land.

Mrs. Osborne also appeared, and applied for a reinstatement of her entry alleging, among other things, that her relinquishment was obtained by fraud, "and was never delivered by her to any one, but was abstracted and stolen from her and filed in this office without her knowledge or consent. She further alleged:

That sometime prior to March 1, 1890, she became indebted to the First National Bank . . . that this affiant at that time had no means with which to pay said indebtedness to said bank; that said bank officers were persistent in requiring immediate payment of said indebtedness or that security be immediately given therefor; that this affiant had no security to give, and that said bank officers required affiant, as a show of good faith on affiant's part that the said indebtedness would be paid by her, to furnish the said bank a relinquishment of her said timber culture entry, at the same time pledging themselves each individually and as officers of said bank that they would in no way take advantage of said relinquishment, or use the same to their own advantage, but would return the same to affiant intact . . . that this affiant was not at that time indebted to the said Charles G. Alton, and received no consideration whatever from said Charles G. Alton for said relinquishment; that she placed said relinquishment in the First National Bank of Ainsworth

for safe keeping . . . and afterwards wholly discharged her indebtedness to said bank, and that the said Charles G. Alton extracted said relinquishment from said bank without leave or license or authority from this affiant, and thereafter filed the same in the land office, and made entry of the land, etc.

She asked for a hearing, etc., and that Davison's application be rejected.

Hearing was ordered by your office letter "H" of April 22, 1893. Upon this hearing the register and receiver by decision of March 23, 1894, held that Mrs. Osborne was in laches as against Davison, and recommended that the proceedings had upon her motion be dismissed and Davison's entry allowed.

Your office, by decision dated December 10, 1894, affirmed that action. A further appeal brings the case here.

It appears that in the year 1887 the Farmers and Merchants Bank of Ainsworth, Nebraska, of which F. B. Tiffany was president and Charles G. Alton cashier, purchased of one Albright a promissory note of about \$3,000, signed by Nannie J. Osborne, Nannie M. Osborne, and Ed. T. Cook. This note was renewed from time to time. Mrs. Osborne at that time owned some property in the town of Ainsworth, consisting of some town lots and an opera house; about July, 1889, she desired to convert the opera house into a hotel in order to make the property more salable, and she applied to the bank to get the money. Her indebtedness to the bank at the time was about \$4,000. At this time the American Investment Company at Emmetsburg, Iowa, had a mortgage on some of Mrs. Osborne's property, and Judge Tiffany, the president of the Ainsworth bank, by giving his bank's guarantee, induced the Investment Company to furnish \$4,500 for the purpose of making the desired improvements. The back taxes and interest on the property then amounted to about \$1,000, and were paid out of the new loan. To induce the Ainsworth bank to guarantee the payment of the \$4,500, and as further security for the sum of about \$4,000 which Mrs. Osborne owed to said bank, Mrs. Osborne made a second conveyance, in the nature of a mortgage, of her hotel property, including other lands and lots, to the Ainsworth Bank; at the same time (about July 12, 1889,) she executed the relinquishment of her timber culture entry, and as a further security she delivered this relinquishment to the bank. It appears to have been the purpose of all parties to secure a sale of the hotel property, in order to pay the Investment Company the \$4,500, and have something left to apply on Mrs. Osborne's debt of \$4,000 to the Ainsworth Bank. At the time the loan from the Investment Company was secured for Mrs. Osborne, and at the time she placed the mortgage on her hotel and other property, she represented that there were no other liens or incumbrances on the land. The officers of the bank found a purchaser for the hotel property who was willing to pay \$5,000 for it; and being anxious to save themselves, went to Mrs. Osborne and tried to get her to accept the offer; she refused, giving as

one of the reasons that there was a judgment in the United States district court against her, which was a lien upon the property prior in time to that made by her mortgage to the Ainsworth Bank. Judge Tiffany, the president of the bank, thereupon investigated the question, and found that Mrs. Osborne had in fact confessed judgment for about \$12,000 in favor of one McCall, some time before she executed the mortgage to the bank. When this was discovered, Mr. Alton, the cashier, immediately filed the relinquishment and entered the land.

The proof shows that this relinquishment was voluntarily given by Mrs. Osborne, and that it was given to further secure the bank. The proof further shows that Mrs. Osborne never paid the indebtedness due the bank, nor did she pay the prior indebtedness secured by mortgages on her real estate and town property, and in May, 1890, suit was commenced to foreclose certain mortgages, and the Ainsworth bank, through its officers, as junior mortgagees, were made party defendant.

Mrs. Osborne made a sworn answer to the cross petition of the Ainsworth bank, in which she says: "The defendants allege that there has been paid upon said indebtedness the sum of \$4,000 in the following manner, viz." Here she sets forth the fact of her having made entry of the land, that she "assigned her interest in and to said above described real estate to C. G. Alton . . . in trust to be held by him as security for the payment of said indebtedness." True, she alleges that the relinquishment was in violation of the agreement filed in the land office, but she also, as above seen, claimed credit for it in her cross-petition, in the sum of \$4,000.

It appears that while Alton's entry was intact upon the records, Davison rented the land, or a part of it, for the purpose of a slaughter pen, he being a butcher. Davison swears he first went to Mrs. Osborne for the purpose of renting it, and was told by her that she did not then own the land, but that it belonged to Alton; this Mrs. Osborne denies, but it is a fact that Davison did rent the land from Alton, paid rent therefor, and there is no testimony showing that Mrs. Osborne made any objection thereto, or sought to assert her supposed rights by demanding rental, but apparently acquiesced in the arrangement.

Again, there is nothing in the record showing that Mrs. Osborne improved the land from and after her relinquishment, July, 1889; she allowed three years and seven months to elapse before she made any effort to assert her claim to the land. If she in fact never intended to relinquish the claim, she was in laches in prosecuting her rights or complying with the law.

It must be confessed that she was unfortunate, if not reckless, in her statements; in order to make a favorable showing in her motion to intervene, she swore (1) that her relinquishment was obtained by fraud and "was never delivered by her to anyone." Her subsequent admissions show this was not true. (2) That the relinquishment was placed in the bank for safe keeping, and that she afterwards "wholly dis-

charged her indebtedness to said bank." This was likewise untrue, for it appears that the bank was never paid.

There is no testimony tending to show any collusion between Davison, the present homestead applicant, and Alton, whose timber-culture entry was contested by Davison. On the day fixed for the hearing on that contest, Davison presented Alton's relinquishment. This relinquishment was in the hands of the receiver of the Ainsworth bank, and was sold by the latter to Davison, who appears not to have known of its existence until the day before the hearing.

From the above facts, it is clear:

1. That Mrs. Osborne voluntarily relinquished her entry, and that the same was placed in the bank to secure the payment of a debt.
2. That this relinquishment was not to be used, if she fulfilled her contract and acted in good faith with the bank.
3. That she deceived the bank in representing that there were no incumbrances or liens upon her real estate except those that appeared in the mortgage records, when she knew that she had confessed judgment for a large sum in the United States court, which would render her subsequent incumbrances of little or no value.

These facts coming to the knowledge of Alton, who held her relinquishment as security for her indebtedness, and was otherwise liable as a bank officer for a large sum of money borrowed for her and guaranteed by the bank, justified him in using the relinquishment, and entering the land as a partial recoupment for his losses, for Mrs. Osborne's failure was then fully apparent, as she had forfeited all claims for a return of her security.

Relinquishments of entries, while not encouraged by the government, are often recognized, and money paid out for a relinquishment, in order to clear the records for an intending entryman, is often taken as an element of good faith, and an evidence of good intention to comply with the law.

The relinquishment in this case was given as an earnest of good faith on the part of a creditor that a debt would be paid; if the debt were paid in good faith, it was not to be used; if not paid, or if the creditor failed to comply in good faith with her agreements and covenants, it was to be used. The debtor failed in every respect, the relinquishment was filed, and her entry canceled, and she afterwards in a suit in chancery prayed credit for the full value of the land.

She is completely estopped from asking a reinstatement of her entry. The rights of a third party intervened after more than three years had elapsed between her relinquishment and application for reinstatement.

For reasons above given, the decision appealed from must be, and it is hereby, affirmed.

BETTS v. SHUMAKER.

Motion for review of departmental decision of December 4, 1895, 21 L. D., 461, denied by Acting Secretary Reynolds, March 27, 1896.

SCHOOL INDEMNITY SELECTION—MINERAL RETURN.

STATE OF CALIFORNIA.

An application to select as school indemnity land returned as mineral cannot be filed and allowed until after due notice of intention to make such application, and the submission of affirmative proof as to the non-mineral character of the land.

The "affirmative proof" thus required should be ample, and may consist of the affidavit of the applicant supported by the affidavits of two or more persons whose acquaintance with the character of land is derived from a careful personal examination of each ten acre tract thereof.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 27, 1896. (E. B. Jr.)

The land involved, as shown by the record, is NW. $\frac{1}{4}$ Sec. 34, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 27, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 28, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 33, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 32, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 26, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 27, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 34, all in T. 7 N. R. 13 E. M. D. M. Sacramento, California land district, and all returned by the U. S. surveyor general as mineral land.

On November 9, 1894, the State of California by its surveyor general presented applications Nos. 2408, 2409 and 2410, for the above described tracts as indemnity school selections, which applications were rejected by the local office on the ground that the land was not subject to such selection "until the mineral return thereof is disproved at a hearing held for that purpose." Upon appeal your office, March 6, 1895, sustained the local office in its rejection of said applications, deciding that

The case is clearly within the rule contained in the last part of the first subdivision of paragraph 110 of the mining circular as amended July 2 (9), 1894, 19 L. D. 21, and that had the said rule been followed, and had there been filed "no allegations" that the land is mineral in character, the selections if otherwise regular might have been approved without a hearing.

The State appeals from the decision of your office assigning error as follows:

I. It was error to refuse to accept the said indemnity selections and thereupon order a hearing to determine whether as a matter of fact said land was of the character returned by the U. S. surveyor general, or whether it was agricultural in character.

II. It was error to hold that land returned as mineral by the U. S. surveyor general is not subject to indemnity selection subject to adjudication as to its character.

III. It was error to summarily reject the indemnity selections.

In *Mining Co. v. Consolidated Co.* (102 U. S. 167) the supreme court, construing the act of March 3, 1853, (10 Stat., 244) granting the sixteenth and thirty sixth section of public lands in California to that state for school purposes, with right of indemnity selection, held that only agricultural lands could be taken by the state thereunder, mineral lands being expressly excepted from the operation of the grant. See also in the connection *Mullen v. United States* (118 U. S. 271). The present case, therefore, under the instructions of July 9, 1894, (19 L. D. 21 and 23), the land having been returned as mineral, falls clearly, as stated in the decision of your office, within the rule therein indicated, which is as follows:

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for thirty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular. (Mining Regulations, approved December 10, 1891, page 36).

This rule it will be observed has reference to proceedings before the local office, and concerns land the character of which has been fixed as mineral by the return of the surveyor general. While this character attaches to the land it is not subject to selection as school land nor under any other than the mining laws. No application to select it as school land can be received until its character is changed to agricultural in the manner provided by the said rule. The notice required is therefore a notice of intention to apply for the land. When this has been given in the manner pointed out and for the time specified and the affirmative proof submitted, then and not until then, and in the absence of allegations that the land is mineral, the application may be filed, and, if otherwise regular, allowed. The "affirmative proof" under the rule should be ample and may consist of the affidavit of the applicant supported by the affidavits of two or more persons whose acquaintance with the character of the land is derived from a careful personal examination of each ten acre tract thereof. The decision of your office is affirmed in accordance with the interpretation herein given to the rule upon which it is based.

HOMESTEAD ENTRY—HEIRS—ADMINISTRATOR—FINAL PROOF.

TRACY *v.* SCHOENAU.

In the completion of a homestead entry where the entryman and his widow are dead, with adult and minor children surviving, the mode of procedure is determined by section 2291, R. S., and the adult, as well as the minor children, will take thereunder.

Where final homestead proof is submitted by one who is the administrator of the estate of a deceased homesteader, and also heir of the decedent, such proof should be regarded as having been made by said party in his capacity as heir, and therefore authorized by law.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) March 26, 1896. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 20, T. 34 N., R. 26 W., St. Cloud land district, Minnesota.

The record shows that Henry Schoenau made homestead entry July 16, 1885, for the above described tract, and that he died in the year 1887, leaving several children, two of whom were minors. His wife died a short time prior to his death.

In the month of April, 1893, Harmon G. Tracy filed his affidavit of contest alleging

that the said Henry Schoenau has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that Hubert Schoenau, of Minneapolis, is the duly appointed administrator of the estate of the said deceased, etc.

Notice was issued and an attempt was made to have personal service upon Hubert Schoenau, a son of the deceased entryman, and the executor of the will of Henry Schoenau. Subsequently, it was ascertained that there was not sufficient time in which to make service, and the notice was returned in order that a new date might be fixed.

Prior to this being done, Hubert Schoenau on June 15, 1893, gave notice that he would offer final proof on August 8, following. The notice recites as "executor of the last will and testament of Henry Schoenau," but this recitation is not in the handwriting of Hubert Schoenau, but apparently in that of the register of the land office.

At the time set, Tracy appeared with his witnesses and protested against the acceptance of the proof, and on November 18, 1893, the local officers rendered their decision wherein they recommended that the protest be sustained, the final proof rejected and the entry canceled. From this decision Hubert Schoenau appealed, and on November 27, 1894, your office decision rejected the proof for the reason that it was submitted by Schoenau as administrator, and was, therefore invalid, and the local officers were directed to notify Tracy that he would be allowed sixty days in which to serve notice of contest on the heirs of Henry Schoenau, deceased, and proceed anew with the contest, and that if he should fail within that time to take such action they were further directed to notify the heirs of Henry Schoenau that they would be given thirty days in which to show cause why the entry should not be canceled for expiration of the statutory period.

Appeal by Hubert Schoenau brings the case to the Department.

Section 2291 of the Revised Statutes, which follows those sections providing for homestead entries, provides:

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow, or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then in such case he, she, or they, if at that time citizens of the United States shall be entitled to a patent as in other cases provided by law.

The next section (2292) is as follows:

In case of the death of both father and mother, leaving an infant child, or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian, may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.

The two sections have been thus fully set out, as upon a construction of them depends the right of the parties. It will be noticed that section 2291, provides, in the event of the death of the entryman, that his widow, or in case of her death, the heirs or devisee, might make proof.

Section 2292 refers to a case where both parents are dead and leave minor children.

The case at bar is one where both parents are dead, leaving both adult and minor heirs.

It is one of the contentions of the appellant that under the last section quoted, the land involved inured to the benefit of the minor children. If there were no construction of the sections by recognized authority, the question would be difficult of answer, but it is met fully in the decision of the supreme court in the case of *Bernier v. Bernier* (147 U. S., 242), where it was held, *inter alia*,

Section 2292 of the Revised Statutes was only intended to give to infant children the benefit of the homestead entry, and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors mentioned in 2291, and to allow a sale of the land within a prescribed period for their benefit.

Mr. Justice Field in delivering the opinion of the court says, page 246:

Section 2291 provides that the certificate and patent in case of the death of father and mother, shall, upon the proofs required being made, be issued to the heirs of the deceased party making the entry, a provision which embraces children that are minors, as well as adults.

Section 2292, in providing only for minor heirs, must be construed, not as repealing the provisions of section 2291, but as in harmony with them and as only intended to give the fee of the land to the minor children exclusively, when there are no other heirs.

And again, "If there are adults as well as minor heirs" which is the case in the cause at bar,

the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that no part of the land has been alienated except in the instances specified, and the applicant's citizenship and loyalty to the government of the United States; but in the other case, where there are no adult heirs and only minor heirs and both parents are deceased, the requirements exacted in the first case are omitted and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants.

That issue has therefore been determined and where there are both adult and minor children and both parents are deceased, the rights of the children and the mode of procedure is determined under section 2291, and not under 2292 of the Revised Statutes, and the adult as well as minor children will take. *Bernier v. Bernier, supra.*

As has been set out, the decision appealed from held that the proof submitted was made by Hubert Schoenau, as administrator, and not heir-at-law, and you set out the following facts as showing in what capacity the proof was made.

The record of this case shows that the notice of intention to make final proof was given by Hubert Schoenau, executor of the last will and testament of Henry Schoenau, deceased. The notice for publication recites that Hubert Schoenau, deceased, had filed his notice of intention to make final proof. In his proof it is recited that Hubert Schoenau, executor of the last will and testament of Henry Schoenau, deceased, being called as a witness in his own behalf, testified as follows, etc.

Each witness is recited as being called in support of the homestead entry of Hubert Schoenau, executor of the last will and testament of Henry Schoenau, deceased. Hubert Schoenau tenders his letters testamentary with his final proof. The appeal is made by Hubert Schoenau as administrator of the estate of Henry Schoenau, deceased. A motion is on file to dismiss such appeal, a reply to which is also on file in which Schoenau's attorney states the case as *Harmon G. Tracy, protestant, v. Hubert Schoenau, as administrator of the estate of Henry Schoenau, deceased.*

I do not concur in the conclusion reached in the former judgment. The facts set forth by your office decision are in great measure destroyed as authority, by the statement that the record as made was made by the local officers, and not by Hubert Schoenau, except in the instance of the style of the appeal, which it is alleged was so styled in order to harmonize with the record as then already made. This is a case where a party clothed in different capacities does an act which in one capacity would be without force and effect, and if done in another capacity would have a legal effect. When such facts exist, the courts will apply the doctrine of *ut res magis valeat quam pereat*. The courts seek to maintain and uphold all instruments submitted for construction.

In *Kelly v. Calhoun* (95 U. S., 710), the court said, through Mr. Justice Swayne, page 713:

It should be the aim of courts, in cases like this, to preserve and not to destroy. Sir Matthew Hale said they should be astute to find means to make such acts effectual, according to the honest intent of the parties. *Row v. Trammor*, Willes, 682.

In *Warner et al. v. Connecticut Mutual Life Insurance Company* (109 U. S., 357), Mr. Justice Matthews, speaking for the court, said, page 368:

We can not doubt that Cyrenius Beers, in the agreement of February 24, 1894, intended to exert whatever power had been conferred upon him by the will of his wife to continue in force the mortgage to the appellee, as an encumbrance upon her estate, for the reason that it is upon that supposition alone that it can have its due legal effect, *ut res magis valeat quam pereat*, and by force of the rules which we have seen ought to govern in such cases, we hold that if the agreement, as made, is within the scope of the power, it must be regarded as a valid execution of it.

What was the intent of Hubert Schoenau in making this proof? Evidently, to comply with the law as he understood it, in order to protect the heirs of the deceased entryman. If the proof submitted by him be viewed simply from the standpoint that he made it as executor, then, under Carlson's heirs (16 L. D., 556), it was a futile act, but if made by him as heir-at-law, the proof, if in other respect showing compliance with the homestead law, would protect the rights of the heirs. Even if it were shown that the entries made in the record were so made as the result of the directions of the appellant, still they might be held to be only descriptive or immaterial variations. Under the broad rule laid down by the supreme court in the cases cited, I am led to believe that it would be erroneous to lay down so technical a construction. It is the duty of the court to seek to find grounds upon which to sustain such actions as that now pending in the case at bar, and not to take a technical view of them. The protestant cannot be heard to object to the form of the proof. He can only urge its insufficiency, and that question is not now being considered.

The decision appealed from is reversed, and the case is returned to you for such action upon the proof of Hubert Schoenau, as, after an examination of it upon its merits, may seem just and proper to you in view of the protest of Tracy, and the expressions herein contained.

RAILROAD GRANT—SETTLEMENT RIGHT—RESIDENCE.

HALLING v. CENTRAL PACIFIC R. R. Co.

A claim that land is excepted from the grant to the Central Pacific on account of adverse occupancy can not be recognized, if it does not appear that residence was established prior to the time when the grant became effective.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 27, 1896. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 35, T. 11 N., R. 3 W., Salt Lake City land district, Utah.

The record shows that in May, 1892, John Halling made homestead application for the above described tract. The application was accompanied by a corroborated affidavit alleging in substance that he went upon the land in 1866, with the intention of appropriating it for his own use, as a home; that he plowed that year the entire surface of that section and put it in crop; that in 1868 he built a corral, and in 1869 he built a dwelling house upon the land, which he occupied as a residence; that he has cultivated the land, or a portion thereof, ever since 1866.

Upon this, your office ordered a hearing to determine the status of the land on October 20, 1868, the date of the definite location of the line of the Central Pacific railway company. Hearing was consequently had in the fall of 1892 and the local officers rendered their decision holding that on October 20, 1868, the plaintiff was a qualified applicant by reason of having filed his declaration of intention to become a citizen and that he was at that time a settler upon the land, and recommended the allowance of Halling's homestead application.

Upon appeal by the company on February 12, 1894, your office affirmed the action of the local officers. A motion for review having been filed on February 2, 1895, your office reversed its former action and rejected the application of Halling; from which action Halling appealed to the Department.

Your office decision states that your records show that on May 14, 1869, one Lars Christiansen filed declaratory statement for the tract in question, alleging settlement thereon on May 4, 1869; that the railroad company contested this filing, and that notice issued by registered mail August 22, 1865, to Lars Christiansen, which was never delivered.

At the time appointed for a hearing December 26, 1885, no appearance was made by Christiansen and the case was continued until January 15, 1886, when Christiansen being absent the evidence of one Lee and Ousley was submitted in evidence. This record being transmitted to your office on March 17, 1888, Christiansen's filing was canceled and on April 8, 1888, the company listed the land.

The examination of the evidence in this case shows that prior to the attachment of the company's rights by reason of its definite location on October 20, 1868, and during the years 1866, 1867 and 1868, the

appellant was in possession of all of that portion of the land involved, cultivated it and raised crops thereon, but it does not appear that he ever established residence thereon prior to October 20, 1868, or for that matter, at any period since that time. Whenever he slept on the land prior to the filing of the map of definite location, it was in a wagon, and while it appears that a house was built by himself and Christiansen in 1869, it does not appear that there was ever any furniture in it or that he ever resided in it, or that he ever claimed a home other than that at Brigham City, twelve miles away.

The question therefore presented for solution is whether such occupation, cultivation and improvements in the absence of residence, would serve to except the land from the operation of the grant in behalf of the Central Pacific railway company.

The act of July 1, 1862, in behalf of said company, granted certain lands to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, the third section of which act excepts from the grant lands to which a pre-emption or homestead claim may have attached at the time said road was definitely fixed. It does not appear that mere occupancy would be sufficient to cause this exception. No rights can be acquired under either the pre-emption or homestead laws by mere occupation or cultivation; residence is essential in both, and no residence having been shown in this case, prior to the date of definite location of the Central Pacific railway, or within ninety days or a reasonable time thereafter, I am led to hold that your office decision appealed from was not in error in rejecting the application of John Halling to homestead this tract.

It being found that no residence was established by Halling prior to the date upon which the rights of the road attached, it becomes unnecessary to pass upon the question of his qualification as a pre-emptor.

The declaratory statement of Christiansen alleging as it did settlement subsequent to October 20, 1868, and having been canceled upon a suit brought at the instance of the Central Pacific railway company, did not serve to except this land from the operation of the grant. The decision appealed from is accordingly affirmed.

MINING CLAIM—PLACER LOCATION—DISCOVERY.

REINS *v.* MURRAY.

In the location of a placer claim on surveyed land it is not necessary to mark the boundaries of the claim on the ground.

The fact that land is returned as mineral does not obviate the necessity of a discovery as the basis of a placer location.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 27, 1896. (P. J. C.)

The record in this case shows that James A. Murray and others located, under the placer mining law, on November 6, 1879, the NW. $\frac{1}{4}$.

of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 8, Tp. 3 N., R. 7 W., Helena, Montana, land district. The approved township plat was filed June 27, 1877, and the tracts were also indicated on the plats as lots 3, 4, and 5, because of the fact that two mining claims and mill-site had been located thereon and patented.

On January 21, 1880, Murray, having meantime acquired the interests of his co-locators, applied for patent for the tracts, describing them as lots Nos. 3, 4, and 5, etc. During the period of publication several protests and adverses were filed, upon some of which suits were instituted. These cut no figure, however, in this controversy.

On May 8, 1893, John P. Reins filed a corroborated protest, in which it is alleged, among other things, that there was never any discovery on said placer claim upon which to make a location; that there has never been any mining improvements placed thereon by applicant; that the annual assessment work since location has not been performed; that the tracts are not placer mining land; and that there are several lode claims located thereon. The protestant alleges that he discovered a vein of quartz on said tracts April 13, 1893, which he located as the Combination lode.

A hearing was ordered, the testimony taken before a notary public, and on consideration the local officers decided that the placer claim was invalid because it had not been staked and marked on the ground, and recommended that the application for patent be rejected. On appeal, your office, by letter of October 20, 1894, held that the location by legal subdivisions was lawful, but decided that contestant had failed to show that lodes existed within the placer claim at date of application, or that the applicant had failed to comply with the law in the matter of expenditures. The protest was therefore dismissed.

A motion for review of this judgment was presented, and on consideration it was held, by letter of February 11, 1895, that your former decision that a placer claim might be taken up by legal subdivisions, and did not have to be staked or marked on the ground, would be adhered to. It was decided, however, on further examination, that there was no discovery of mineral upon which to locate the placer claim, and for this reason the motion for review was sustained and the former judgment revoked.

The case comes before the Department on the appeal of the applicant, and the ruling on the two points mentioned, as well as others, is specified as erroneous.

Section 2324 of the Revised Statutes demands that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." This requirement is specially in reference to lode claims, and its sole purpose is to define on the surface of the ground the territory claimed. In addition to this, a location certificate must be recorded, which, among other things, shall contain "such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

Section 2329 of the Revised Statutes, in relation to the location of placers, provides that they may be located and patented

under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

The "like circumstances and conditions" referred to in this section clearly apply only to discovery, location, and, where the location is made on unsurveyed lands, marking the boundaries of the same as of a lode claim, and for the same purpose, as defined above. It does not, in my judgment, mean that when the placer is located on surveyed lands, it is necessary to mark the boundaries. There is no purpose that can be subserved by so doing. The public surveys are as permanent and fixed as anything can be in that line, and any fractional part of a section can be readily found and its boundaries ascertained by that method for all time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes or monuments.

By section 2330 "legal subdivisions of forty acres may be subdivided into ten acre tracts," and section 2331 provides that, where the placer claims "conform to legal subdivisions, no further survey or plat shall be required." It seems to me, therefore, that it is clearly the intention of the statute that the location of placer claims by legal subdivisions makes the marking of the boundaries an idle ceremony that is not contemplated by the law.

In the finding of your office that there was no discovery of mineral on which to make the placer location, I concur. The testimony of the applicant himself is conclusive on this point. He says: "I located the ground in 1879; I located it by legal subdivisions, or fractions thereof, and therefore it was not even necessary to make a discovery, the ground having been returned as mineral land." The fact that land is returned as mineral by the surveyor-general does not in any event avoid the necessity of a discovery of mineral, and any location made without a discovery as required by statute is void. It may be said, in addition, that the applicant also admits that no annual work was done by, or for him, on the premises from the date of location to the year 1892. It is also shown that there has never been any discovery at any time of a placer mine on the ground, and that it never has been worked for a placer deposit.

In view of this it is not deemed necessary to discuss any other questions suggested by the appeal, as on this ground the application must be canceled.

Your office judgment of February 11, 1895, is, therefore, affirmed.

DESERT LAND ENTRY—COMPACTNESS—CHARACTER OF LAND.

WILLIAM H. WHEELER.

In determining whether a desert entry comes within the requirements as to compactness the topography of the adjacent tracts, and the unsuitability thereof for purposes of agriculture, may be taken into consideration.

A natural growth of timber occupying a narrow non-irrigable ridge that forms a small part of a tract embraced within a desert entry will not be held to defeat the entry as improperly allowed for lands not subject to such appropriation.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 28, 1896. (W. M. B.)

On December 16, 1892, William H. Wheeler made desert land entry for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$; the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$; the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 36, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 25, T. 46 N., R. 14 W., and also the unsurveyed NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31, T. 46 N., R. 13 W., N. M. P. M., Montrose land district, Colorado, which appears not to be in a compact body.

With regard to the question of compactness—in your office letter of November 7, 1894, to the local officers—you say:

Inform the claimant that he must show cause, in the form of an affidavit, why he should not amend his entry; that his entry cannot be allowed to stand in its present form, unless he can furnish the clearest proof that it is compact according to the regulations of the Department from time to time.

To meet such requirement the claimant in due time forwarded his own affidavit corroborated by two witnesses, wherein it was stated that:

The said described land lies between the hills bordering on the Rio San Miguel river on the north and the canon, or draw, on the south, that he made the entry as compact as the nature of the land would permit for the reason that the adjacent tracts are in rocky, mountainous, and timbered ground, not susceptible of irrigation, hence he was obliged to make the entry in its present form.

In your office decision of February 5, 1895, wherein Wheeler's said entry is more fully considered and discussed, it is stated, among other things, that the field notes in your office seem to bear out, for the most part, the statement made by the claimant in his affidavit; but that they show that the land is rough and mountainous between sections 25 and 36, T. 46 N., R. 14 W., and covered with heavy pine, soil being third rate; and also that the land between section 36, T. 46 N., R. 14 W., and section 31 T. 46 N., R. 13 W., is high and mountainous, heavily timbered, soil third rate.

It appears further that the plats do not show any stream running through or near the lands covered by the entry.

The tract in question contains 320 acres and is one and one quarter miles in length, from north to south, and three quarters of a mile wide at the point of greatest breadth, from east to west, being one quarter of a mile at point of narrowest breadth.

The decision of your office of date November 7, 1894, was reaffirmed by a more recent one of date February 5, 1895,—rendered subsequent to the submission by Wheeler of what would seem to be satisfactory proof with respect to the compactness of the entry—wherein it was again held that the entry could not be allowed to remain in its original shape; Wheeler being allowed sixty days within which to amend and adjust his entry by relinquishment of some of the subdivisions now claimed by him, and entry of others sufficient in number, with addition of those retained from original or former entry, to make up the quantity of land embraced in former filing, and of such relative position to subdivisions not released, as to cause his entry to cover a compact body of land.

From such action of your office Wheeler appealed here, alleging that those subdivisions which lie contiguous or adjacent to those already embraced in his entry—which if added thereto, by amendment or adjustment of his said entry as would cause it to assume a compact form—are mountainous and not susceptible of irrigation and cultivation, and contends that the adjacent subdivisions hereinbefore described as constituting the entry in its present form are—under existing conditions—of such compactness as has received the approval and sanction of this Department as is evidenced by its more recent decisions.

What may be considered compact is not specifically prescribed in the desert land act, and one of the latest departmental decisions, in a case in point with the one at bar with regard to the requirement under the law as to the shape of a tract for which entry is made, and wherein that question is discussed at length, is that of *ex parte* Thomas Hunton (11 L. D., 27), it being therein held that:

It is impracticable to establish inflexible rules which shall govern the shape or form of an entry. Each case must depend upon the circumstances surrounding it, and whether an entry should be regarded as sufficiently compact to answer the requirements of the law must depend largely upon the nature and location of the land, its means and facilities for irrigation and the rights of adjacent and surrounding entrymen.

The entry in the case under consideration, so far as compactness, shape, or form are concerned does not appear to be quite as irregular or unsymmetrical as that involved in the case just cited; the tract covered by this last named entry contains 640 acres of land; lies partly in three different sections; is one and three quarter miles in length, one mile wide at point of greatest breadth, and one quarter mile at point of narrowest breadth.

The entry made by Wheeler, as in the present case, cannot be considered any more objectionable—with respect to shape and compactness—than that made by Hunton, or that made by William Thompson, as described in case reported in 8 L. D., 104, and those of a similar character allowed in some other cases not necessary to be cited herein.

While the tract covered by claimant's entry may not be circumscribed or confined to its present existing form by adjacent entries, yet

its boundaries were, as appears from the corroborated affidavit of appellant, restricted by the subdivisions adjacent thereto being of a rugged, mountainous character, non-irrigable, untillable, and consequently unfit for purposes of agriculture. The stated condition and character of such contiguous tracts—necessary to give to the tract entered by appellant a square form, if added thereto—will be considered as fully sufficient to warrant their exclusion from his entry, and to justify the allowance of the said entry in its original form.

In your office decision some stress is placed upon the fact, as evidenced by the field notes, that a natural growth of trees or timber was found to exist upon a small portion of the tract embraced in appellant's entry, which circumstance you conclude would tend to exclude the entire tract in question from the class of entries denominated as desert land by virtue of restriction contained in the fourth rule or requirement of circular of the General Land Office of 1892, page 30, which prescribes that: "Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert land."

The field notes show that the timber on said tract was found upon a broken, mountainous ridge occupying the dividing line between certain subdivisions—as hereinbefore described—on the extreme northern portion of the tract, but it is not claimed or anywhere shown that there is a natural growth of trees upon any portion of the main body of the land, covered by the entry, which lies far below the mountainous land forming a part thereof, and which only is susceptible of irrigation, and which in fact has already, as it would appear, been irrigated at considerable expense to appellant.

It sometimes happens in desert land districts in the State of Colorado that timber and smaller trees are found growing upon rocky mountainous lands, while the lower lands forming the plain below, in close proximity thereto, will not produce a vegetable growth, or agricultural products of any kind in paying quantities, without irrigation. It also happens in some instances that while upon such rocky, broken mountainous lands a natural growth of timber is found, still it is also true that when land of said character is denuded of such growth thereon that it does not possess sufficient moisture to yield garden or field products of any description by or through any process of cultivation; and lands of such rocky and broken character cannot be irrigated by reason of their elevation.

X It having been the evident object and purpose of the desert land act to authorize and permit desert land entry to be made of lands which could not be cultivated successfully, nor made profitable for agricultural or other purposes without irrigation, the fact that an inconsiderable portion of the area thereof is made up of non-irrigable mountainous land of the character above described, will not be deemed sufficient to except the tract filed upon from desert land entry, especially when the land so excluded from entry is only susceptible of successful cultivation, or profitable use, through or by actual irrigation. X

For the foregoing reasons your office decision disallowing the entry in question upon the grounds therein stated is hereby reversed.

It appears from the record that there is no adverse claimant to the land involved, and further that the claimant has submitted proof and made payment on his said entry for the third and last year, and the papers transmitted by your office letter "G" of May 13, 1895, are herewith returned for appropriate action in the case.

SECOND CONTEST—HEIRS OF HOMESTEADER—RELINQUISHMENT.

AGNEW *v.* MORTON ET AL.

A second contest will not be allowed on an issue involved in the first and finally settled therein.

A contest will not lie against an entry that is canceled of record prior to the initiation of the adverse proceeding.

The only person entitled to call in question the legality of a relinquishment of a homestead entry executed by an heir of the entryman, are such other heirs of the deceased as may be qualified to consummate the entry.

The validity of a subsequent entry of the land so released will not be questioned, so far as the status of the land at the date of the entry is concerned, where such relinquishment is shown; *prima facie*, to have been executed by the only qualified heir, and the statutory life of the entry thus relinquished has expired.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 28, 1896. (W. M. W.)

The case of Jesse B. Agnew *v.* Barney Morton and Michael Lally, involving the NE. $\frac{1}{4}$ of Sec. 34, T. 17 S., R. 25 E., Visalia, California, land district, on the appeal of said Agnew from your office decision of January 8, 1895, has been considered.

On June 29, 1885, Barney Morton made homestead entry for the land in question.

On December 12, 1887, said Agnew filed an affidavit of contest against Morton's entry, charging abandonment, change of residence, etc., and that Morton had died "leaving no heirs who are entitled to perfect said entry."

A hearing was had, and the case reached the Department through successive appeals, and on September 2, 1891, it was decided adversely to Agnew and in favor of the heirs of Morton (see 13 L. D., 228); and on review said decision was adhered to on February 19, 1892 (14 L. D., 205).

On May 13, 1892, Bridget Lally filed a sworn statement in the local land office stating that she is a sister of Barney Morton, who made homestead entry, No. 3835, June 29, 1885, for the NE. $\frac{1}{4}$ of Sec. 34, T. 17 S., R. 25, Visalia, California, land district; that she is the nearest of kin and sole heir of said Barney Morton, who died in the county of Tulare, State of California, on or about the 21st of April, 1887;

that as the sole heir of said deceased and the nearest of kin thereof residing in the United States, and being a citizen thereof, she does hereby grant, devise and relin-

quish all her right, title and interest in and to the land described in receiver's receipt No. 3835, an affidavit for the loss of which is hereto attached, to the government of the United States. and asks that said homestead entry be canceled upon the records of the United States land office at Visalia, California.

Thereupon the local officers, on the same day, canceled said entry, and Michael Lally, the husband of Bridget Lally, made homestead entry, No. 8495, for said land.

On the 1st day of August, 1892, Michael Lally filed in the local land office an affidavit setting forth,

that said Barney Morton is dead, and never was married; that he left no widow or minor orphan children surviving him at the time of his death, or any heir qualified to claim said entry except the said Bridget Lally, etc.

On the 11th day of September, 1893, Jesse B. Agnew filed an affidavit of contest against the canceled homestead of Barney Morton and the homestead entry of Michael Lally, charging:

That said land was settled upon by one Bernard Murtaugh, who has never applied to enter the same for more than ninety days after his settlement;

That said Bernard Murtagh who has never applied to enter the same is dead;

That said Bernard Murtaugh left no heirs at law under the provisions of the law of the State of California, who are qualified to succeed him in interest in this land or to make final proof in his name.

That said Bernard Murtaugh was a native of Ireland and never declared his intentions to become a citizen of the United States under the name of Bernard Murtaugh.

That the said homestead entry No. 3835 made in the name of Barney Morton was fraudulently relinquished by one Bridget Lally claiming to be a sister of Barney Morton and the sole heir;

That said relinquishment was filed in the U. S. Land Office at Visalia, California, May 13th, 1892, and the entry of said Barney Morton was therefore unlawfully canceled of record;

That said relinquishment is not a relinquishment of said entry but is only the relinquishment of Bridget Lally to her right, title and interest to said entry, and said entry was improperly canceled on such relinquishment.

That the purported relinquishment of Bridget Lally was fraudulent in the further respect that if it was intended as a relinquishment of the claim of Barney Morton, it was fraudulent and collusive, in that it was intended for the purpose of deceiving the Land Department and of allowing her husband to enter the tract of land embraced in Morton's homestead, thereby to deprive contestant Agnew of the rights which should accrue to him by his prior contest.

That in the contest of Agnew *v.* Morton, reported in 13 L. D., 228, it is shown that the Barney Morton named in said entry left surviving him a father and mother residing in Ireland, a sister (Bridget Curley) who resided in New York, and the children of another deceased sister who lived in the city of New York, that therefore the heirs of Barney Morton, named in said entry, have not relinquished said entry.

That homestead entry No. 8495 made for said land on May 13th, 1892, by Michael Lally is fraudulent and irregular, and that said land is properly embraced in the homestead entry No. 3835 of Barney Morton.

That said Michael Lally has no right to said land and is a trespasser thereon, and working in collusion with the said Bridget Lally, his wife;

That the said tract of land was not settled upon and cultivated by the heirs of Barney Morton as required by law;

That the heirs of said Barney Morton had wholly abandoned said land for more than twelve months prior to the date of said relinquishment of Bridget Lally and immediately prior hereto;

That said tract is not settled upon and cultivated by said parties as required by law;

That more than seven years have elapsed since the date of entry of said homestead entry No. 3835 of said Barney Morton;

That neither said Morton, nor any one in his behalf, not any heir at law, have offered any proof on his said entry, and this the said contestant is ready to prove at such time and place as may be named by the register and receiver for a hearing in said case; and he therefore asks to be allowed to prove said allegations, and that said homestead entries Nos. 3835 and 8495 may be declared canceled and forfeited to the United States, he, the said contestant, paying the expenses of such hearing or should accrue to contestant by reason of his former contest, and denying the right of the Department to have canceled homestead entry No. 3835, and that if the said entry No. 3835 has been properly canceled by the Department then and in that case contestant Agnew should have been notified thereof and notified of his prior right to make homestead entry of the land therein embraced as provided by the act of June 15, 1880.

The local officers denied a hearing on the following grounds:

Homestead entry # 3835 of Barney Morton was canceled by relinquishment May 13, 1892, and no one but an heir of said Barney Morton can be heard as to the illegality of said relinquishment, and, further, that the allegations do not allege abandonment nor failure on the part of Michael Lally to comply with the requirements of the homestead law as to his homestead entry # 8495, covering said land, and further, that the contest of Agnew v. Morton (13 L. D., 228,) was dismissed and closed prior to the cancellation of said homestead entry # 3835.

Agnew appealed, and on January 8, 1895, your office sustained the local officers in denying a hearing on the affidavit of contest, and added:

Should this action become final, you will at once notify Michael Lally that he will be allowed ninety days in which to procure and file the relinquishment of the other heirs above referred to. Should he fail to do so in the time allowed, his entry will be canceled.

Agnew appeals. He specifies the following errors:

Said decision is contrary to law in the following particulars:

a. The Honorable Commissioner erred in holding that Agnew, the contestant, is not the proper person to put into question the validity of said relinquishment. b. The Honorable Commissioner erred in holding and deciding that the allegations of the affidavit of the contestant Agnew in this case had been adjudicated by the Department of the Interior in the case of Agnew v. Morton (see 13 L. D., 228). c. The Honorable Commissioner of the General Land Office erred in holding and deciding that Agnew, the contestant, was not entitled to a preference right of entry under his former contest. d. The Honorable Commissioner of the General Land Office erred in holding that any valid relinquishment of the entry of Barney Morton has ever been made. e. The Honorable Commissioner erred in holding and deciding that the affidavit of contest of said Agnew is not sufficient to warrant a hearing being ordered on the homestead entry of Michael Lally # 8495.

The issues tendered in this affidavit as against the entry of Barney Morton are essentially the same as were made, heard and finally determined by the Department in the case of Agnew v. Morton (13 L. D., 228), and on review (14 L. D., 205). The Department has held that a second contest should not be allowed on issues involved in the first, and finally disposed of on appeal to the Department; and that an issue

once tried and determined cannot be made the basis of a second contest. *Reeves v. Emblen* (8 L. D., 444); *Gray v. Whitehouse* (15 L. D., 352); *Curtin et al. v. Morton* (22 L. D., 91).

If Morton's entry was in existence, these authorities would clearly sustain your office decision in rejecting Agnew's contest affidavit. Morton's entry had been canceled for nearly sixteen months when Agnew filed his affidavit of contest, and was not as a matter of fact in existence at the time said affidavit was filed, and it seems clear on principle that a contest will not lie against an entry that does not exist at the time of filing or that has actually been canceled prior to the filing of the contest affidavit.

As to the allegations of Agnew's affidavit against Lally's entry, there is no charge that Lally has in any respect failed to comply with the requirements of the homestead law since making said entry. Agnew is not asserting any claim to the land, he is attempting to assert some sort of a preference right to it under the decision in the case of *Agnew v. Morton*, which was adverse to him, and as a matter of law cut off his preference right to enter said land, which he would have had if the contest had finally terminated in his favor. He certainly is not in a position to complain, either of the cancellation of Morton's entry, nor of the allowance of Lally's entry.

I agree with your office decision, and that of the local officers, that the only persons who would have the right to complain of the cancellation of Morton's entry are such of Morton's heirs at law as are qualified to complete and consummate his entry outside of Mrs. Lally.

In your office decision reference is made to the evidence respecting Morton's heirs in the case of *Agnew v. Morton* (13 L. D., 228), and the judgment recites that:

Should this action become final, you will at once notify Michael Lally that he will be allowed ninety days in which to procure and file the relinquishment of the other heirs above referred to. Should he fail to do so in the time allowed, his entry will be canceled.

In my judgment, this order is erroneous, for several reasons. In the first place, it does not follow that the persons shown to have been Morton's heirs when the evidence in the case of *Agnew v. Morton* was taken, are necessarily in existence in 1895; the persons shown to have been his heirs may have died since that case was heard. The relinquishment of Bridget Lally was certainly good so far as her interest as one of Morton's heirs went; it was accompanied by a statement under oath that she was the only heir at law of Morton; her oath was supplemented by the sworn statement of Michael Lally to the same effect; these statements are sufficient, in the absence of contradicting evidence, to *prima facie* establish the fact that at the time of Michael Lally's entry, Bridget Lally was the only qualified heir of Barney Morton. Aside from this, there is no one claiming to be an heir of Morton claiming anything or any right in his entry or making any adverse claims against Lally's

entry. In the second place, if there are other heirs of Morton, they would not be entitled now to make final proof, for the reason that Morton's entry was made June 29, 1885, nearly ten years before your office decision was rendered, whereas they were only allowed by law seven years within which to make their final proof. This order of your office is reversed, and with this modification the judgment appealed from is affirmed.

CONTEST—PRACTICE—COSTS OF PROCEEDINGS—MOTION TO DISMISS.

ROBERTS *v.* STANFORD.

Where a contestee files a motion to dismiss the contest for the failure of the contestant to pay the costs of the suit, and said motion is sustained, and the contest dismissed without considering the testimony, and an appeal is taken from such action, the case should be remanded for further proceedings by the local office, if the decision on said motion is found erroneous.

A contestant who declines to pay the costs of a hearing waives the preferred right of entry accorded by section 2, act of May 14, 1880.

If a contestant after the submission of his testimony fails or refuses to pay the further costs of the proceeding, the case then rests between the contestee and the government, and it is incumbent upon said contestee to submit such testimony as he may have on his own behalf.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 30, 1896.* (P. J. C.)

The land involved in this appeal is lot 2 of the NE. $\frac{1}{4}$, lots 1 and 2 of the NW. $\frac{1}{4}$, Sec. 6, Tp. 32 N., R. 3 W., M. D. M., Shasta, California, land district.

The record shows that George Newton Stanford made homestead entry of said tracts June 11, 1887. On February 10, 1894, Benjamin F. Roberts filed an affidavit of contest, alleging failure to establish residence thereon, etc. A hearing was had before the local office, when the contestant submitted his testimony in chief. The defendant then went upon the stand, and his testimony in chief and cross was taken. He then put another witness on the stand, and after a few questions had been propounded, the following occurred as shown by the record:

Now comes the contestant, Benjamin F. Roberts, and makes the following statement to the register and receiver. (Mr. Roberts.) I have no further money to continue this contest. I make this statement for the reason that the receiver has informed me that the amount of money which I have deposited to cover the cost of reducing the testimony to writing in this case, to wit: the sum of ten $\frac{00}{100}$ dollars (\$10.00), has all been already applied, and that there is at the present time a small balance due from me on account of testimony already reduced to writing; and that before proceeding further with the case it would be necessary for me to make another and further deposit.

Now comes the attorney for the homestead claimant and says: that the homestead claimant is present here with his witnesses, ready and willing to have his testimony taken in this cause. That five witnesses still remain to be examined, besides the remainder of the testimony of Mr. Melton, the last witness on the stand whose

examination had just been begun. That by said witnesses the homestead claimant is prepared to prove his right to the land described in his homestead entry. That by Rule 54 of the Rules of Practice the contestant must pay the costs of the contest; and on his failure to do so, the homestead claimant moves that this contest be dismissed.

Motion taken under advisement by register and receiver until 3 o'clock p. m.

3 o'clock p. m. Register and receiver now decide that the motion of counsel for homestead claimant to dismiss this contest shall be granted; and inasmuch as it appears that the homestead claimant has not as yet had the time, opportunity, or privilege of presenting his case, and as it now appears that the contestant herein is unable to advance further money to cover the cost of reducing any further testimony to writing in this case, and as Rule 54 of the Rules of Practice provides that the contestant shall pay the costs of reducing the testimony to writing in all contests of this character, the said contest is accordingly this day dismissed.

The contestant herein, Benjamin F. Roberts, will be allowed thirty days from date hereof within which to appeal from this action to the Hon. Commissioner of the General Land Office, and upon failure to appeal within the time specified, the action of the register and receiver will become final as to all questions of fact.

From this action the contestant appealed, assigning as error that the action of the local office was "contrary to the evidence in the case." By letter of November 9, 1894, your office decided that the act of the register and receiver in dismissing the contest was erroneous, and on examination of the testimony adduced decided that the entry should be canceled; whereupon the entryman prosecutes this appeal, assigning as error:

1. That said decision of the Hon. Commissioner is contrary to the law and to the rules of practice adopted by the Department of the Interior in land contests, and particularly to Rule 54 of the Rules of Practice.

2. That said decision is contrary to law and equity.

3. Appellant claims that the only question on which the Hon. Commissioner could render a decision was on the validity of the order of the register and receiver in dismissing the contest for failure to pay the fees of taking down the testimony of the homestead claimant's witnesses as prescribed by Rule 54, etc.

In deciding this case your office examined the testimony and concluded, in the order here stated, first, that the contestant made out a *prima facie* case; second, that the testimony of contestee was strongly corroborative of that offered by the contestant, and by his own (Stanford's) testimony it was conclusively shown that he had not established his residence on the land; and, third, that "Rule 54 must be given a sensible interpretation."

It will be observed that the local officers did not pass upon the facts at all, but their decision was on the motion to dismiss because the contestant failed to comply with the rule requiring him to pay all the expenses of taking the testimony. It will also be noticed that Roberts did not base his action on the ground that the defendant had practically admitted his charge, and that it was therefore not necessary for him to produce more evidence, but he puts it on the sole ground that "I have no further money to continue this contest." Whether he *had* no money, or simply none "to continue this contest," is not clear. But be this as

it may, it is clearly apparent that the evidence was not taken into account by the local officers. Hence the appeal filed by the contestant was, in the very nature of things, from their action in sustaining the motion. It follows, therefore, that as between the parties to this contest it was error in your office to consider the testimony and render a judgment thereon. This position is fully sustained by the case of *Bradford v. Aleshire* (18 L. D., 78). In that case the defendant, after depositions had been taken, moved to dismiss the contest for want of jurisdiction in the local officers. It was said by the Department on re-review:

It will be borne in mind that the local officers had not passed upon the testimony taken before the notary, and before doing so, the defendant appeared and raised the question of jurisdiction of the local office to try the case. Without examining the testimony or passing upon the merits of the controversy, they sustained the motion and held that there had not been legal service upon the defendant. Your office affirmed this decision, but the Department overruled it, and then, for the first time in the history of the case, the testimony was examined and held to be sufficient to warrant the cancellation of the entry. In my opinion this latter action was erroneous. The judgment demanded by the proceedings was one upon the motion to dismiss. When final action was taken upon this motion the case should then have been remanded to the local office for its further action.

It can make no difference in this doctrine that the question there was jurisdictional as distinguished from the issue in the case at bar. I take it that the rule announced would apply with equal force.

Again, it is clear that Roberts by his action forfeited his preference right. Section 2 of the act of May 14, 1880 (21 Stat., 140), provides that "in all cases where any person has contested, paid the land office fees, and procured the cancellation of any" entry, on notice thereof, "shall be allowed thirty days from date of such notice to enter said lands." A condition precedent is that he shall pay the land office fees. In addition to this, in the affidavit of contest filed by Roberts, he agreed to pay "the expenses of such hearing," asked for with the view of canceling Stanford's entry. His refusal to comply with the terms of the statute, and his own direct promise, which fixed his status as a contestant, necessarily deprives him of a preference right.

Under the doctrine in the case of *Hansen v. Nilson et al.* (20 L. D., 197), it is clear that the action of the local officers was erroneous. It was there decided:

Where a contest, commenced under Rule 54, has been sustained by the testimony offered by contestant, the claimant is put upon his defense, whether the contestant claims the preference right or not. If at any stage of the proceedings prior to closing his case the contestant waives the preference right of entry, or if he should decline to pay the cost, as required by Rule 54, the case should proceed as if it had been commenced under Rule 55.

Roberts being out of the case as a contestant, by refusing to comply with the rules, the question then was one between the government and the entryman, and it devolved on the latter to proceed with his testimony. His motion to dismiss, however, being erroneously sustained,

the entryman should not be deprived of his right to proceed, if he desires to do so, and give such testimony as he can in the light of the changed conditions, showing his good faith.

Your office judgment is, therefore, modified, and the case will be remanded, with instructions to proceed in accordance with this opinion.

HOMESTEAD CONTEST—COMPLIANCE WITH LAW.

VINZANT *v.* FORSYTH.

The physical condition and poverty of a claimant may be taken into consideration, where good faith is apparent, in determining whether there has been substantial compliance with the requirements of the homestead law.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 30, 1896. (C. J. W.)

July 25, 1891, Mary Forsyth made homestead entry No. 24,600, for the SE. $\frac{1}{4}$ Sec. 18, T. 9 S., R. 2 E., Kansas. January 27, 1893, she made application to commute her homestead to cash entry, with notice of her intention to make final proof March 10, 1893, and the same day an order was issued for the publication of the notice, which publication was made first on February 2, 1893.

February 18, 1893, Joseph Vinzant filed his affidavit of contest, alleging

that Mary Forsyth has wholly abandoned said tract, that she has changed her residence therefrom for more than six months, since making said entry; that said tract is not settled upon and cultivated by said party as required by law, and in fact said claimant never has resided on said land in a permanent and fixed manner.

March 14, 1893, the receiver at the Salina land office allowed Mary Forsyth to make cash entry No. 5649, afterwards stating that the register was absent and that he did not know of the pendency of the contest as no notations appeared on the dockets. Your office suspended said final proof and ordered a hearing on said contest, which was had July 25, 1893. The hearing was had at Salina, but the transfer was made to Topeka before any decision was rendered. On March 3, 1894, the local officers found in favor of contestant and ordered the cancellation of said entry. A motion for rehearing was made and allowed, and on September 26, 1894, after a motion made for continuance by defendant was overruled, the case was submitted on the testimony formerly taken. November 2, 1894, the local officers rendered their decision finding in favor of the defendant, and recommending the dismissal of the contest. November 29 following Vinzant appealed, and on March 19, 1895, your office affirmed the decision of the local officers. From this decision contestant appeals.

The principal allegations of error are, that the finding is against the evidence, and that defendant is not a qualified homesteader. The

evidence discloses that James Forsyth, the father of Mary, formerly entered the land in question under the timber culture laws. He was a cripple and an invalid, and of limited means. Mary is also a cripple and very weak physically and mentally. The father succeeded in fencing the land with wire, and made two drains or ponds, and used the land as a pasture, after exhausting his resources in efforts to grow trees on the land, which were only partially successful. The evidence shows that desiring to create a home for his crippled child, he relinquished his entry for her benefit. She made the entry in question. She succeeded in having built a house of small value on the land, and established residence on it about the last of May, 1891, with her father and mother, and remained there until the last of July, 1891, when they went to Clay Center for medical treatment of her feet. Soon after reaching that place her mother, who was the only member of the family capable of labor, was taken sick, and lingered until December, 1892, when she died. A few days after the death of the mother the defendant married one Weibel, who did not own a home, but she did not return to the land until March 9, 1893, where she was residing at the time of the hearing. It seems that she succeeded in borrowing money sufficient to commute her homestead to a cash entry. It appears from a letter from her former attorney attached to the record, that her father died soon after her mother, and that pending this litigation the defendant has become insane and is in an asylum. The land is being rented out for pasturage, for which purpose it is best adapted, and the proceeds used for the benefit of the defendant. The case is a peculiar one, and presents the defendant in every stage of its progress in a situation of such helplessness as to demand the upholding of her entry, if it can be done without violence to the law. It will be noted that plaintiff's counsel insist that this weakness and inability, mental and physical, made her ineligible as a homesteader. While it is true that it is the policy of the homestead laws to encourage agricultural improvement and development, I am not prepared to concede that they are so framed as to deny a home on the public domain to those who are too poor to make improvements and too helpless physically to perform labor, but that in such cases, following the spirit of the law rather than the letter, good faith when clearly manifested and accompanied by efforts at improvement commensurate with the ability of the entryman will be accepted as a compliance with the law. In the case of Israel Martel (6 L. D., 566), it was held that the rule requiring actual residence of the claimant on the land for six months preceding final entry is for the purpose of testing the good faith of the settler, and where that is otherwise shown, temporary absences during any period of settlement not inconsistent with an honest intention to comply with the spirit of the law will be accounted a constructive residence. (*Nelson v. St. Paul M. & M. R. R. Co.*, *ibid*, 567)—

The poverty of the claimant, the condition of his family, and the severity of the

climate are matters entitled to consideration in determining whether due compliance with the law as to residence has been shown.

These references are sufficient to show the humanity of the law, and the weight attaching to evidence of good faith.

I am satisfied from the evidence that the defendant established residence on the land after her entry, and maintained it in the spirit of the law at least until the time of her marriage in 1892, and that between that time and her return to the land in March, 1893, nothing is shown indicating that she had abandoned her intention of returning to the land but that the fact that what household effects she owned remained all the time in her small house rather indicates an intention to return. Even if it was to be held that her constructive residence terminated with the death of her mother in December, 1892, six months from that date had not elapsed when Vinzant filed his contest, so that it was premature as to any ground for contest arising after December 18, 1892. If any such ground did arise it is now only a question between her and the government.

Under extraordinary difficulties the defendant paid the government price for the land, and I think she should have the benefit of it. Your office decision is accordingly approved.

TIMBER LAND ENTRY—AMENDED APPLICATION.

GURINE SOVDE.

An application to make a timber land entry may be changed, as to the land included therein, on a satisfactory showing that after the date of the original application, and prior to the time fixed for the completion of the entry, the timber on the tract first applied for was destroyed by a forest fire, through no fault of the applicant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 30, 1896.* (E. E. W.)

On the 22d of May, 1894, Gurine Sovde filed an application in due form at Duluth, Minnesota, to purchase the NE. $\frac{1}{4}$ Sec. 6, T. 63 N., R. 19 W., under the timber and stone act of Congress of June 3, 1878, as amended by the act of August 4, 1892. The register and receiver designated the 13th of August, 1894, as the time for making proof and purchase, and the applicant published notice thereof as required by the said act of Congress. On the 13th of August she declined to offer proof or make purchase, and on the 22d of September following she filed an application to amend her said application to purchase by striking out the said NE. $\frac{1}{4}$ Sec. 6, T. 63 N., R. 19 W., and substituting the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 10, T. 59 N., R. 20 W., in lieu thereof. With this application, and as ground therefor, she also filed a relinquishment to the United States of all interest in and claim to the said NE. $\frac{1}{4}$ Sec. 6, and a corroborated affidavit in which she alleged that that tract was

valuable chiefly for timber; that she desired to purchase it only for the timber, but that between the said 22d of May, the date of her application to purchase, and the said 13th of August, the day designated for proof and purchase, to wit, on or about the 1st of August, 1894, a forest fire destroyed all the valuable timber thereon and rendered it worthless; that the origin or cause of the fire was unknown to her, but that it was not chargeable to any fault of hers.

The register and receiver did not pass on this application to amend the application to purchase, but on the 16th of October, 1894, they transmitted it to the Commissioner of the General Land Office with the remark that it appeared to them to be meritorious.

On the 8th of December, 1894, the Commissioner rejected the application in a decision reading in part as follows, to wit:

There is no provision in the act of June 3, 1878, or the act of August 4, 1890, amendatory thereof for contingencies, which may occur by fire or otherwise destroying timber, the chances of which the purchaser must necessarily take. The application is therefore rejected.

It was error to reject the application. The decision seems to deal with the applicant as if she had already actually purchased, but she was only a mere applicant to purchase, and not an actual purchaser. It is true that the timber and stone act does not expressly provide for amendment or change of an application to purchase, but it is also true that no such provision is contained in the statute authorizing any other kind of entry. Nevertheless, it is the uniform rule of the Department to allow correction, amendment and change of application to homestead, before actual entry and segregation of the land, and in some cases even after entry, and no reason is seen why amendment or change of an application to purchase under the timber and stone act may not be allowed. In this case there had been no entry, no segregation, no adverse right, only an application to purchase, and before the day came when the law would allow such purchase, the very quality of the land which brought it within the class subject to purchase was destroyed by an agency for which the applicant was not responsible. Then simply because the applicant applied to purchase this particular tract while it was valuable for timber shall she be compelled to purchase it after its value has been destroyed pending the delay entailed by the law, or lose her right to purchase under the law at all? It is the opinion of the Department that the law is too liberal in its character to admit of that construction.

The decision of the Commissioner of the General Land Office is reversed, and the applicant will be permitted to change her application, as asked, and to make entry of the tract now applied for after due notice and in the absence of an adverse claim.

HOMESTEAD ENTRY—FINAL PROOF—HEIRS.

ELIZA WILLIS.

In the event of the death of a homesteader leaving a widow and heirs, where the final proof is made on behalf of the heirs, and it appears that the widow has abandoned her rights, the proof may be accepted, and the patent issue to the heirs generally.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *March 30, 1896.* (W. F. M.)

On December 3, 1888, James Beagle made homestead entry of the SE. $\frac{1}{4}$ of section 4, township 109, range 62, within the land district of Huron, South Dakota, and died on September 16, 1890.

On August 10, 1894, Eliza Willis, wife of J. N. Willis, representing that the "claimant's family consisted of a wife, no children, and that his wife refused to live on the land," made final proof as his heir, and final certificate issued thereon.

In passing upon the proof it was held by your office that "according to the homestead law, the homestead right cannot be devised away from the widow," citing Sec. 2291 of the Revised Statutes, and the register and receiver were directed

to ascertain the residence of the widow of the deceased entryman, and advise her that she will be allowed sixty days from receipt of notice, within which to furnish the final affidavit in said case, or to appeal, and in the event of failure to take action within the time specified, the entry which is hereby held for cancellation, will be canceled without further notice from this office.

Mrs. Willis, who appears to be the sister of the entryman, has filed, with her appeal to this Department, the affidavit of her husband stating

that the wife of said Beagle not only refused to live with the deceased on the claim, but abandoned him and left this State; and affiant nor Mrs. Willis, the final proof claimant, neither of them know where the said widow is, and have been unable to find her or learn where she is; and for this reason supposing the heirs had the right to make proof where the widow had abandoned her rights, the heir made the final proof. And that said widow has not been on the said land since the death of the claimant, nor made any improvements whatever on the land; and that all the cultivation and improvement that have been put on the land since the claimant's decease have been done by the heirs and by this heir who made final proof.

The acceptance of the final proof by the register and receiver and the issuance of final certificate is equivalent to a finding in favor of the contention of Mrs. Willis as to the facts upon which she bases her right, to wit, the failure of the widow to cultivate, her abandonment of her husband, of the land and of the State, ignorance of her address or residence, and her own, Mrs. Willis' heirship and compliance with the law as such since the death of the entryman. The register, again, on February 16, 1895, reporting an effort to comply with the directions of your office as to notice to the widow, states that "this office has been unable to ascertain the residence of the widow of this entryman."

It is not deemed necessary or proper that the rights of the widow or the facts respecting her alleged abandonment of her husband should be the subject of adjudication at this time. It is sufficient to find that the land has been earned from the government and that the equitable title has thereby vested in some rightful party.

Upon the death of an entryman the right to acquire patent does not devolve so absolutely upon his widow that it passes to her heirs at her death. This Department has held distinctly otherwise in at least three cases. *Vide Richards v. Rasmussen*, 17 L. D., 212, and cases there cited. It has been held, furthermore, that the widow must seasonably exercise her right "so that a stranger or third party shall not be injured or materially prejudiced by any laches of her own." *Orvis v. Banks*, 2 L. D., 138. In that case the "third party" was a pre-emption claimant, but it is pertinent here as indicating the character or nature of the widow's right. The heirs stand next to her in the order of statutory succession and if she should die before the exercise of her right they inherit, not from her, but from the entryman. In principle, the right should, by parity of reasoning, pass to the heirs in the event of failure of the widow, from any cause, to exercise it. It is important to keep in mind the true relation of the widow to the entry, that is to say, that no right can pass through her. Her incapacity to make final proof resulting from death, or for instance, from lunacy after interdiction, appears to me not to be distinguishable, in law, in so far as it affects the heirs, from neglect or refusal to exercise the right. Under the civil law the heirs may renounce a succession and in that case the next heir takes the estate. In the instant case the widow's conduct amounts to a renunciation, as the record shows, but the courts are open to her in case the record be misleading. Meanwhile, there is an estate that somebody should succeed to and care for.

In the case of Thaddeus M. Armstrong, 18 L. D., 421, final proof was made by the guardian of a minor child, during the lifetime of the widow, but the entry was not canceled on that account, and an order was made directing the suspension of the entry and allowing the widow "a reasonable time after notice within which to assert her claim as widow;" thus recognizing that in the event of the widow's inaction the heir may succeed to the entry.

It results from the foregoing reasoning that the patent should issue to the heirs generally, and it is now so ordered.

SCHOOL LAND—INDEMNITY SELECTION—DOUBLE MINIMUM LAND.

STATE OF CALIFORNIA.

A school indemnity selection of double minimum land, of one half the acreage of a single minimum loss, made under a practice of the Department that permitted such selections, and that was acquiesced in by the State, is held to have exhausted the right of the State to indemnity so far as such basis is concerned.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
March 31, 1896. (G. C. R.)

The State of California has appealed from your office decision ("K") of March 4, 1895, rejecting applications, No. 2652 R. & R. No. 71, a, b, and c, filed April 7, 1892, to select as school lands lots 1, 2, 3 and 4, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 2, and lot 1, Sec. 3, T. 39 N., R. 5 E., and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 35, T. 40 N., R. 5 E., embracing in all 409.11 acres, in lieu of deficits in fractional townships 48 N., R. 1 E.; 26 N., 5 E.; 47 N., R. 5 E., and 20 N., R. 8 E., M. D. M., Redding, California.

Your office states that:

There is no question as to the eligibility of the selected lands or of the existence of the deficiencies assigned as bases of the selection. The only fact shown as bearing against the validity of the selection is that portions of the same deficits have heretofore been assigned in support of other selections of one half the acreage of said deficits. The reason for this anomalous method of selection lies in the fact that in the townships wherein the deficits occurred the lands were of the class held for disposal at \$1.25 per acre, while the lands selected had been increased in price to \$2.50 per acre.

It thus appears that in the present selections the same deficits are assigned, as had once been employed to support selections which appear to have been allowed under an established practice of your office.

The State contends, however, that inasmuch as only one acre of indemnity was allowed to two acres lost in the prior adjustment, the former selection should be regarded as having been made acre for acre, leaving the deficits in support of the present selection unsatisfied, and therefore valid bases.

Your office admits that the State only secured as indemnity one half the acreage employed as basis for the selections; but you deny the right of the State to use the same basis for a new selection, to make up the difference, on the grounds that when the first selection was made, the State, through its officers, was a party to and acquiesced in that adjustment, and should therefore be held to it.

Section 3398 of the Political Code of California provides that:

The surveyor general is the general agent of the State for the location in the United States land-offices of the unsold portion of five hundred thousand acres of land granted to the State for school purposes, and the sixteenth and thirty sixth sections granted for the use of public schools, and lands in lieu thereof.

Such general agent was thus empowered to make selections of lieu lands for the granted sections; this officer made the selection, agreeing to select, and did select, double minimum lands in one half the acreage employed in the bases. The practice of allowing double minimum selections for single minimum bases was thereafter (4 L. D., 76; 5 L. D., 543,) discontinued, it being held in the decision last quoted that "it was not intended that such lands (double minimum) should be selected in lieu of lost school sections." This decision was overruled in State of Oregon, 18 L. D., 443, where it was held that the State is entitled to select for lands lost in place other lands, acre for acre, regardless of price, whether single or double minimum. The last named case, however, was based principally upon the grounds that the act of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes, used language plain and unambiguous, and was regarded as a legislative interpretation of previously existing laws.

But when the selection was first made by the constituted powers of the State, the practice of allowing selections of double minimum lands for half the acreage of the single minimum bases employed was in vogue, and, as above seen, this was acquiesced in, the adjustment was made, and the matter settled.

When adjustments of school land indemnity have been made and long acquiesced in by the State under an interpretation of the law either by your office or this Department, that adjustment cannot be disturbed by a subsequent and more liberal interpretation; for until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal. *Miner v. Mariott*, 2 L. D., 709; *William Thompson*, 8 L. D., 104.

The decision appealed from is affirmed.

RAILROAD LANDS—SECTION 3, ACT OF MARCH 3, 1887.

SOUTHERN PACIFIC R. R. CO. *v.* BAER.

Under a pre-emption claim embracing land open to settlement at date of filing declaratory statement, on which the final proof as made is accepted as to part of the land and patent issued therefor, but rejected as to the remainder, and the filing to such extent erroneously canceled on account of a railroad grant, the provisions of section 3, act of March 3, 1887, authorize the restoration of the settler to his original rights, and the recognition of his claim in its entirety as against a subsequent indemnity selection of the tract erroneously eliminated from his entry in the first instance.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
April 3, 1896. (W. A. E.)

The tract here involved, viz: the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 13 S., R. 23 E., Visalia, California, land district, is within the indemnity limits of the Southern Pacific Railroad, under its grant of July 27,

1866 (14 Stat., 292), the order for the withdrawal on account of which was made by your office letter of March 3, 1877.

On September 7, 1880, Crist C. Baer filed pre-emption declaratory statement for the SE. $\frac{1}{4}$ of said section 13, alleging settlement thereon February 15, 1880. After due notice he offered final proof in support of his claim to the entire quarter section, but this proof was rejected by the register and receiver as to the S. $\frac{1}{2}$ of said SE. $\frac{1}{4}$ on account of the indemnity withdrawal for the benefit of the Southern Pacific Railroad Company. The local officers informed him, however, that they would accept his proof as to the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, which was not embraced in the indemnity withdrawal, if he desired to take that. Baer accordingly, after having tendered payment for the entire SE. $\frac{1}{4}$ and formally protested against the rejection of his proof as to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, consented to purchase the N. $\frac{1}{2}$ of said quarter section, and on December 10, 1881, patent was issued to him.

August 9, 1884, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section was selected by the railroad company in its list of that date.

March 26, 1886, Baer filed petition asking that he be allowed to purchase the S. $\frac{1}{2}$ of said quarter section, in accordance with his original application, on the proof already offered by him. In support of this petition he submitted his own affidavit in which he alleges that he settled on the land in question on the 15th of February, 1880, prior to survey, and was instrumental in having it surveyed; that he filed pre-emption declaratory statement for the entire SE. $\frac{1}{4}$ of said section and offered proof and payment therefor; that he agreed that final certificate should issue for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ only at the suggestion and by the advice of the local officers; that he never consented to nor acquiesced in the rejection of his claim to the S. $\frac{1}{2}$ of said SE. $\frac{1}{4}$, but employed a lawyer to appeal from such action; that he believed appeal had been duly filed, and rested on his rights in the premises until he learned that the Southern Pacific Railroad Company had sold said tract; that he has never abandoned his claim to the entire tract originally entered by him, but stands ready at any time to pay the additional money that was refused by the local officers.

Your office held, by letter of February 19, 1895, that Baer was entitled to the entire tract originally applied for by him, that the company's selection of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ should be canceled, and that upon the surrender by Baer of his patent for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, new patent would issue to him for the entire SE. $\frac{1}{4}$ of said section 13.

From this action the railroad company has appealed, assigning as error:

1. That the case is *res judicata* by the former action of the register and receiver, and the issue and acceptance of a patent by Mr. Baer for said N. $\frac{1}{2}$ SE. $\frac{1}{4}$.
2. That it was error to hold that Mr. Baer could now pay for said S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and receive a patent on preemption proof made nearly fifteen years ago.
3. That it was error to refuse to recognize and affirm the right of said company under its selection of August 9, 1884, which selection was made after a final decision in favor of the company.

In the case of *Holmes v. Northern Pacific Railroad Company* (5 L. D., 333), Holmes made homestead entry for a tract of eighty acres in an even section, together with a tract of eighty acres in an adjoining odd section. This entry was canceled by decision of the Department in so far as it covered the land in the odd section, being in conflict with a railroad grant, and Holmes received patent for the eighty acres in the even section. Subsequently, he filed petition asking to have his entry reinstated as to the land in the odd section, which had been canceled as aforesaid, claiming that said tract was excepted from the grant to the railroad company by the homestead entry of one Miller that existed at the date of withdrawal, and which was canceled after withdrawal and prior to Holmes' entry. The railroad company opposed this petition on the grounds that the question as to whether Holmes or the company had the better right to this tract was *res judicata*; that Holmes, by his acceptance of patent for eighty acres had shown his acquiescence in the decision of the Department; and that he had exhausted his homestead right. On investigation it was found that the allegations contained in Holmes' petition were true, and, further, that he had remained in possession of said tract and continued to improve it up to the date of his petition. The Department thereupon held that said tract was excepted from the grant to the company and the question of reinstatement was one solely between Holmes and the government; that his entry had been erroneously canceled as to said tract and it was accordingly directed that upon his surrender of the patent already held by him that patent issue to him for the entire tract embraced in his original entry, it appearing that his final proof covered the entire one hundred and sixty acres.

The case of *Michael Donovan* (8 L. D., 382,) is even more directly in point, being almost exactly parallel with the present case. In 1866, certain lands within the indemnity limits of the Southern Minnesota Railroad were withdrawn on account of the grant to said railroad company. At the date of withdrawal the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of a certain odd section within said indemnity limits, together with an adjoining eighty acre tract in an even section, was embraced in the homestead entry of one Lyman Barkley, which was canceled January 14, 1868. On June 6, 1868, Michael Donovan presented his homestead application for all of the land embraced in the former entry of Barkley, and was informed by the local officers that he would be allowed to enter the eighty acres in the even section, but would not be allowed to enter the eighty acres in the odd section, as the same was railroad land and not subject to entry. He thereupon made entry of the land in the even section, and on July 1, 1875, received patent therefor. Subsequently to the application of Donovan, the railroad company selected said tract in the odd section, and on March 25, 1871, it was certified to the State for the benefit of the railroad company. In 1888, Donovan filed petition asking that proceedings be instituted under the act of March 3, 1887 (24 Stat., 556), to restore to the United States title to the eighty acre tract in the odd

section aforesaid, and that he be permitted to perfect entry therefor according to his original application.

The third section of said act of March 3, 1887, reads as follows:

That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be re-instated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

The Department held that:

It was undoubtedly the intention of the act to protect the *bona fide* settler in all his rights as against the railroad company, and, therefore, the object and purpose of section three, above quoted, was not only to correct all decisions made by the Department or the General Land Office, erroneously canceling the homestead or pre-emption entry of any *bona fide* settler to lands within railroad grants, whether said lands had been certified to the company or not, but, also, to re-instate the settler in all his rights to lands upon which he may have settled, and for which his application to file or enter may have been rejected by the local office, provided it be shown that said application to file or enter was erroneously rejected, and that the settler had not located another claim or made entry in lieu of the land for which his application to file or enter had been so erroneously rejected. In such case, the Department is re-invested with jurisdiction to re-instate the settler in all his rights, and allow him to perfect his entry or filing by complying with the public land laws, if application to be re-instated in such rights be made within a reasonable time.

It was accordingly directed that demand be made upon the railroad company for reconveyance of the land, and in case the company refused to reconvey, the matter was to be submitted to the Attorney General for the purpose of instituting proceedings against the company to have said certification canceled, as provided for by the second section of said act of March 3, 1887, Donovan's application being suspended in the meantime.

In the present case, it is clear that when Baer filed his pre-emption declaratory statement for the SE. $\frac{1}{4}$ of section 13, the whole of said tract was open public land, subject to entry under the pre-emption or homestead laws. (*Titamore v. Southern Pacific R. R. Company*, 19 L. D., 249.) His filing was erroneously canceled, therefore, as to the S. $\frac{1}{2}$ of said SE. $\frac{1}{4}$. He comes fully within the remedial provisions of the act of March 3, 1887, and is entitled to a restoration of his original rights.

Your office decision is accordingly affirmed, and upon the surrender by Baer of the patent now held by him for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 13, and payment by him for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section, you will cancel the railroad company's selection, and issue patent to Baer for the entire SE. $\frac{1}{4}$, it appearing that the proof submitted by him covered the entire one hundred and sixty acres.

PRACTICE—PROCEEDINGS ON REPORT OF SPECIAL AGENT.

EVA MAUD FERGUSON.

Where an entry is held for cancellation on the report of a special agent, subject to the right of the entryman to apply for a hearing, and the entryman declines to ask for such hearing but appeals, such action on his part will be taken as an admission of the facts as found below, on which final judgment may be properly rendered by the Department.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
April 4, 1896. (C. J. G.)

The land involved in this case is the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 10, T. 46 N., R. 8 W., Ashland land district, Wisconsin.

On May 27, 1893, Eva Maud Ferguson made homestead entry for said land, and on August 8, 1894, commuted the same to cash entry.

On November 10, 1894, upon the report of a special agent, your office held said entry for cancellation, at the same time advising claimant that she would be allowed sixty days in which to apply for a hearing to show cause why her entry should be sustained.

Claimant neglected to apply for a hearing, but on January 5, 1895, appealed to this Department from your said office decision, claiming that said decision allowed her sixty days within which either to apply for a hearing before the local office, or to appeal to this Department.

By your office letter of January 29, 1895, said appeal was denied, on the ground that under the rules of practice your office decision of November 10, 1894, was an interlocutory order from which an appeal does not lie. It was also denied that there was anything in the order of November 10, 1894, to warrant the statement that claimant would be allowed to appeal from said order to this Department. Claimant, however, was granted another sixty days within which to apply for a hearing before the local office in accordance with the terms of said order.

Upon the refusal of claimant to take advantage of the second opportunity afforded her to submit testimony in support of her claim, your office by letter of March 20, 1895, canceled her entry, and the local office was instructed to hold the land in question subject to entry by the first legal applicant.

Claimant has again appealed to this Department from your said office decisions.

Acting under the rules of practice, your office treated its decision of November 10, 1894, as an interlocutory order, and denied appeal therefrom. In the recent case of Patrick Fox (20 L. D., 468) the Department held however that:—

Where an entry is held for cancellation on the report of a special agent, subject to the right of the entryman to apply for a hearing to show cause why his entry should be sustained, the entryman may decline to apply for a hearing, and appeal to the Department for a consideration of his case as it stands on the record.

In view of this authority, and in view of the fact that claimant elected to treat your office decision of November 10, 1894, as a final judgment, this Department under its supervisory authority may properly render decision on the record submitted.

The special agent in his report alleged that claimant never established residence on the land in question, was never on it but twice, and that she made the entry at the instance and in the interest of another person.

In the case of *United States v. Northern Pacific Coal Company* (16 L. D., 259), it was held that a refusal and neglect to apply for a hearing, under an order of your office holding an entry for cancellation on the report of a special agent, constitutes an admission of the truthfulness of the charges on which said order is predicated.

Accompanying claimant's appeal to this Department are several affidavits filed for the purpose of refuting the charges contained in the special agent's report. But there is nothing in said affidavits to show that claimant's residence, if established, has been maintained, and no refutation whatever of the charge that the entry was made for speculative purposes.

In the case of *W. H. H. Findley* (6 L. D., 777) it was held (syllabus):

If an entry is held for cancellation on the report of a special agent charging sufficient cause therefor, and the entryman, after the notice, fails to apply for a hearing, such failure is taken as a confession of the charge, and a waiver of any claims of to the land; and if the entry is finally canceled, the entryman has no just ground for complaint.

Your office proceedings in this case have been regular, and the decision of March 20, 1895, canceling claimant's entry is hereby affirmed.

TOWNSITE v. TRAUGH ET AL.

Motion for review of departmental decision of December 18, 1895, 21 L. D., 496, and for rehearing in the case, granted by Acting Secretary Reynolds, April 6, 1896.

PRACTICE—APPEAL—ATTORNEY.

ELIJAH D. STEEN.

An appeal taken by an attorney who has not been admitted to practice before the Department will be dismissed, if after due notice to him, and to the appellant, he fails to take the requisite steps to secure recognition.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
April 6, 1896. (G. C. R.)

With your office letter of March 12, 1896, you transmit the papers in the case of *ex parte* Elijah D. Steen, including an appeal filed in the local office at Valentine, Nebraska, July 23, 1896, from your office deci-

sion of May 17, 1895, which denied his application to amend his timber-culture entry No. 7985, covering the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 28 N., R. 32, so as to embrace the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 27 N., R. 31 W., in said land district.

The appeal was filed by one F. M. Walcott, as attorney for Steen.

The records of your office failing to show that Walcott had complied with the regulations in regard to attorneys, your office, on August 19, 1895, directed that appellant be notified "that he will be allowed fifteen days within which to file a proper appeal, or to have his attorney comply with said regulations." Specific directions were also given to furnish Steen and his attorney (Walcott) with a copy of your said office letter of August 19, 1895, which further advised the appellant that papers relating to a compliance with the regulations respecting attorneys should be filed "in the office of the Secretary of the Interior."

On September 19, 1895, the local officers forwarded to your office certain papers relating to Mr. Walcott's compliance with the regulations, and these papers were forwarded by your office to this Department, on September 28, 1895. This was all that was done by appellant or his attorney in the matter of compliance with your office instructions.

In your said letter transmitting the papers including the appeal, it is stated that the records of your office did not then (March 12, 1896,) show that Mr. Walcott had been admitted to practice before the Department, and the case was submitted "for such action as you may deem proper."

It appears that Mr. Walcott's application for admission to practice before this Department was duly received and considered, and on October 26, 1895, he was called on to comply with regulation No. 7. This regulation is as follows:

An applicant for admission to practice under the above regulations must address a letter to the Secretary of the Interior, inclosing the certificate and oath above required, in which letter his full name and post office address must be given. He must state whether or not he has ever been recognized as attorney or agent before this Department or any bureau thereof, and if so, whether he has ever been suspended or disbarred from practice. He must also state whether he holds any office of trust or profit under the government of the United States.

The regulations for the recognition of attorneys and agents are prescribed by the Secretary of the Interior by virtue of the act approved July 4, 1884 (Vol. 23, U. S. Stat., p. 101), and section 5498 of the Revised Statutes prescribes a penalty for

every officer of the United States, a person holding any place of trust or profit who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity, or any share of or interest in any claim from the claimant against the United States, etc.

Regulation No. 7 was, therefore, made for the protection of both the attorney seeking recognition and the government.

A recent examination of the records shows that Mr. Walcott has either neglected or ignored the plain requirements of this Department, as set forth in the letter addressed to him about five months since.

Had appellant not been notified that his attorney had failed to take the requisite steps to secure his recognition before this Department as an attorney, it would not be proper to dismiss his appeal. *Tucker v. Nelson*, 9 L. D., 520. But he was in fact notified, as evidenced by the attempted effort of his attorney to be recognized. Your office appears to have fully complied with Practice Rule No. 82 and notified the claimant of his defective appeal, and gave him the fifteen days therein prescribed to amend it, and plainly advised him what was required. It is possible that he depended upon his attorney to perfect the appeal, but that cannot excuse him in the light of the facts disclosed by the record. He trusted his case to an attorney, who has failed to comply with the regulations entitling him to recognition. He has failed, after notice, to file a proper appeal, and the so-called appeal cannot be considered.

The same is, therefore, dismissed, and the papers are herewith returned for the files of your office. Let Mr. Steen be notified of the action herein taken by sending to him a copy of this decision.

PERCUTY *v.* CONDIT.

Motion for review of departmental decision of January 21, 1896, 22 L. D., 54, denied by Acting Secretary Reynolds, April 6, 1896.

FINAL PROOF—PRACTICE—NOTICE.

CLAPP *v.* KELLOGG.

Final proof taken by the register and receiver outside of office hours may be considered, where it appears to have been so taken because the witnesses could not attend at any other time, and that their testimony was submitted with due opportunity for cross-examination by the adverse claimant.

In the case of a hearing ordered on the application of an adverse claimant, the notice of such proceeding should be personally served on the entryman.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 6, 1896. (C. W. P.)

By your letter of April 16, 1895, you transmitted the appeal of Walter P. Kellogg from your office decision of February 7, 1895, rejecting his final proof on his pre-emption claim, No. 4143, to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 25, T. 7 S., R. 73 W., Leadville land district, Colorado.

I cannot concur in your decision.

It appears from the report of the register and receiver that two of the claimant's witnesses, Jones and Cowboy, were railroad employees, and had to appear at their office out of office hours—one of them before

9 A. M., and the other after 4 P. M. Miss Clapp, who appeared as protestant, therefore dictated the questions she desired to ask these witnesses, which were taken down by the register as dictated and propounded to the witnesses, and the questions and answers sent by the local officers to your office, with the proof.

Upon the ground that these witnesses were examined out of office hours, your office rejected Kellogg's proof, and required him to make new proof.

I am of opinion that this was error. I think, under the circumstances, that the local officers were warranted in their action.

But it appearing from the record that notice of the hearing ordered by your office letter of September 21, 1893, as provided by rule 5 of Rules of Practice, was given by registered letter, and that Miss Clapp did not appear at the hearing, I think another hearing should be ordered.

The plaintiff, Mary Clapp, filed pre-emption declaratory statement, No. 4103, for the NW. $\frac{1}{4}$, Sec. 24, T. 7 S., R. 73 W., Leadville land district, Colorado, on April 4, 1890, alleging settlement on March 10, 1890, which was amended by your office letter of March 9, 1892, to the NW. $\frac{1}{4}$ of section 25, of the same township and range.

On August 16, 1890, Kellogg filed his pre-emption declaratory statement, No. 4143, alleging settlement on August 1, 1890. Kellogg made final proof before the register on March 14, 1893, and on the 30th of that month certificate and receipt, No. 1567, were issued in his favor.

After the allowance of Kellogg's entry, Miss Clapp addressed several letters to your office, calling attention to the charge made by her at the time of Kellogg's final proof, that Kellogg had never lived upon or cultivated the tract as required by law, and asking the setting aside of his claim and the "recovery" of her own: Whereupon a hearing was ordered.

Where there is an adverse claimant under a pre-emption filing, and the pre-emptor publishes notice of his intention to make final proof, the adverse claimant is entitled to be specially cited. The notification to him need not be by personal service but may be by registered letter, or unregistered letter, the receipt of which is shown, or acknowledged. (*Reno v. Cole*, 15 L. D., 174.) But it is well settled that notice of contest by registered letter is not personal service within the meaning of rule 9, of Rules of Practice, and such notice is bad as notice made under said rule. (*Elting v. Terhune*, 18 L. D., 586).

The case at bar is clearly an adversary proceeding, the result of which will virtually determine the rights of the parties to the land in question. Hence it is in the nature of a contest, and, as such, requires personal service of the notice of hearing (*Parish v. Jay* 19 L. D., 405).

The decision of your office is therefore reversed, with instructions to return the case to the local officers for proceedings *de novo* on your order for hearing of September 21, 1893.

JOEL E. DAVIS ET AL.

Motion for review of departmental decision of October 18, 1895, 21 L. D., 318, denied by Acting Secretary Reynolds, April 6, 1896.

RAILROAD GRANT—INDEMNITY SELECTIONS—HOMESTEAD ENTRY.

GRINNELL *v.* SOUTHERN PACIFIC R. R. CO.

A list of indemnity selections rejected by the local office on account of the company's failure to designate losses in lieu of selections made prior to the circular of August 4, 1885, does not operate to reserve the lands included therein from homestead entry.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 6, 1895. (F. W. C.)

I have considered the appeal by Emory E. Grinnell from your office decision of January 12, 1895, holding for cancellation his homestead entry covering the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35, T. 25 S., R. 29 E., M. D. M., Visalia land district, California, for conflict with the indemnity selection by the Southern Pacific railroad company.

This tract is within the indemnity limits of the grant for said company under the act of July 27, 1866, and was included in a list of selections filed by the company December 9, 1885. Relative to said list your office decision states: "This application was allowed and went to record as a selection, May 10, 1892, but the company's rights thereunder relate back to the date when the application was presented."

In its answer to the appeal the company states:

The railroad company applied to select said tract December 9, 1885, per list No. 23, designating proper basis therefor. The register and receiver rejected said list on the ground that the company had not designated losses for previous indemnity selections. The company appealed to the Commissioner.

The commissioner took up the list and on November 4, 1891, advised the register and receiver that their objection did not warrant a rejection of said list No. 23, and he returned the same for their further consideration, and required the selecting agent of the company to file a new list. Whereupon the company prepared list No. 56 giving the same loss as that in list 23. List No. 56 was approved by the register and receiver May 10, 1892, for all tracts on which final entries had not issued, and said list contains the tract in question.

While the company's appeal from the register and receiver's rejection of list 23 was pending in the commissioner's office, the register and receiver, on January 16, 1888, allowed Mr. Grinnell to make original homestead entry No. 6112 for said S. $\frac{1}{2}$ SW. $\frac{1}{4}$ 35 with the E. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 34. On August 15, 1893, Mr. Grinnell submitted final proof. Said proof was rejected by the register and receiver, because the tract in Section 35 had been selected by the company May 10, 1892, and Mr. Grinnell appealed.

These are treated as the admitted facts in the case, but your office opinion is silent as to the condition of the company's selection list of December 9, 1885, and the action thereon.

The question thus presented by the record is: did the company gain any such right by the filing of its list on December 9, 1885, as would bar the allowance of an entry upon a tract included in the list?

By the circular of August 4, 1885 (4 L. D., 90), addressed to the local officers, it was directed—

Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

In referring to said circular, it was held in departmental decision of May 1, 1891, in the case of *Sawyer v. Northern Pacific R. R. Co.* (12 L. D., 448)—

The subsequent circular of Secretary Lamar, of August 4, 1885 (4 L. D., 90), requiring a basis of loss for such selection, was not designed to invalidate selections heretofore made, but required the company to designate the losses in lieu of which such prior selections had been made, and directed the district officers not to receive any further selections until such order had been complied with.

It is clear therefore, that if the company had not complied with the circular and specified a basis for selections approved prior to the promulgation of said circular, the local officers were justified in refusing to receive further indemnity selections, and no rights were required by the attempt to make further indemnity selections, until the circular had been complied with, which you report was not until October 27, 1888.

It has been repeatedly ruled that there was no authority for an indemnity withdrawal on account of the grant for this company, and that no rights were acquired within the indemnity limits until selection had been made in the manner prescribed.

The allowance of Grinnell's entry on January 16, 1888, was therefore proper.

Your office decision holds that "there is nothing of record, or in the proof made by Grinnell, showing the initiation of a right or claim to the land prior to or at the date when the company first applied for it."

The proof, however, shows that the land "had been actually settled upon and occupied ever since the spring of 1870."

It is true that the qualifications of the settler are not set forth, and it would be necessary to order a hearing to determine the status of the land at the date of selection, but as I am of the opinion that no rights were acquired by the selection of December 9, 1885, and that Grinnell's entry was properly allowed on January 16, 1888, the question as to the status of the land on December 9, 1885, becomes immaterial.

Your office decision is accordingly reversed, and the company's selection will be canceled.

SWAMP LAND CLAIM—HOMESTEAD ENTRY.

MARQUAM *v.* WAISANEN.

As between a homestead claimant and a transferee of the State under the swamp grant, a decision of the local office that the land is in fact not of the character granted should not be disturbed in the absence of appeal, where prior to the acquisition of the transferee's title the selection of the State had been finally rejected.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 6, 1896. (J. L.)

This case involves the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 29, the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and lot 1 of section 32, T. 8 N., R. 4 W., containing 161.50 acres, in Oregon City land district, Oregon.

On December 22, 1885, Olaf Waisanen made homestead entry No. 6415 of said land. On November 2, 1891, after final proof, he was awarded final certificate No. 3418. On February 24, 1892, your office suspended said final entry (with others) "for reason of conflict with the claim of the State of Oregon under the swamp land grant;" and directed the local officers to advise Waisanen that he might

elect, either to have his entry canceled without prejudice to his rights under the homestead laws, to contest the claim of the State under the grant, or to procure and forward through you a quit claim deed from the proper State authorities (of Oregon), as provided by the act of the legislature of February 2, 1889.

Accordingly Waisanen filed a quit claim deed from the authorities of Oregon conveying to him the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 29 and lot 1 of section 32, containing 81.50 acres. He could not procure a deed for the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of section 32, because said authorities had previously conveyed said tract of eighty acres to one U. S. Grant Marquam.

Whereupon Waisanen contested the claim of the State under the swamp land grant, by filing a sworn statement under oath corroborated by two witnesses, as required by paragraph 1 of the circular of December 13, 1886, (5 L. D. 279). The governor of Oregon was notified as required by paragraph 2, and after the lapse of sixty days after service of notice, the local officers reported that no action had been taken by him. By force of paragraph 4 of said circular, "the State was deemed concluded from thereafter asserting a claim to the land under the swamp land grant."

By letter "K" of August 22, 1892, your office, after reciting the foregoing facts, called the attention of the local officers to the fact, that Waisanen's affidavit of contest showed that the State had conveyed to Marquam the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of section 32, containing eighty acres; and to the further fact that Marquam had not had any notice of the foregoing proceedings, and had been given no opportunity to protest against the perfection of Waisanen's entry. Whereupon your office directed the local officers to notify Marquam, and allow him a reason-

able time within which to object or protest; and, (if any objection be filed), to order a hearing to determine the character of the land involved, giving due notice to all parties in interest.

Accordingly on September 6, 1892, Marquam filed an affidavit of contest against Waisanen's entry as to the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of section 32, containing eighty acres, in which he alleged, that said eighty acres were swamp and overflowed lands within the meaning of the act of March 12, 1860; that he had purchased the same from the State of Oregon in good faith and for valuable consideration, and that he was then the owner and holder thereof; and that Waisanen's entry thereof was not made in good faith. Whereupon Marquam prayed that a hearing be ordered to determine the character of said land and the respective rights of the parties therein, and that Waisanen's entry be canceled as to said eighty acres.

The hearing of the contest thus initiated by Marquam, was had on February 13, 14, and 15, 1893. On July 30, 1893, the local officers found as matter of fact,

that while the land is subject to periodical overflows, much of it is susceptible of cultivation, and crops of vegetables of some kinds and grasses, can be successfully cultivated and raised thereon, and it is not such land as could be taken by the State of Oregon as swamp land under the act of March 12, 1860.

And they recommended that Marquam's contest be dismissed and that the homestead entry of Olof Waisanen be relieved from suspension and allowed to pass to patent.

On August 16, 1893, the attorneys for Marquam in writing, acknowledged service of a copy of the foregoing decision of the local officers. And Marquam did not appeal therefrom to your office. Nevertheless your office on May 10, 1894, reversed the finding and the decision of the local officers and held Waisanen's homestead entry for cancellation. And Waisanen has appealed to this Department.

It appears by your office decision, that the township aforesaid was surveyed in the year 1856; that the lands involved in this case were with others selected as swamp lands by the State of Oregon in the year 1871, but the selection was not reported to your office until January 1873. By letter "K" of April 12, 1879, your office notified the governor of Oregon that the State's claim to said land, (naming among others the E $\frac{1}{2}$ of section 29 and all of section 32 of T. 8 N., R. 4 W.,) was held for rejection, because the selection was not made within two years from the adjournment of the legislature of the State of Oregon at its next session after the date of the act of March 12, 1860; and also notified him that the State authorities were allowed sixty days within which to appeal from said decision. No appeal was taken, and by operation of law your said office decision became final.

The pending controversy is between Marquam and Waisanen alone, each of them claiming adversely to the other the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of section 32, containing eighty acres. The deed from the State of Oregon

to Marquam conveying said eighty acres, and bearing date January 31, 1889, is in evidence. But the record shows that the State then had no right, title, interest or estate in said eighty acres; her claim to the same having been twice adjudicated against her, first in 1879, and again in 1892, as hereinbefore set forth. I think your office erred in reopening the controversy between Marquam and Waisanen, which had been settled by the findings of fact by the local officers; with which Marquam seems to have been content, inasmuch as he did not appeal therefrom. He thereby relinquished all interest in the case, and left it to be decided as a matter between Waisanen and the United States. The proof is clear and uncontradicted, that Waisanen has acted in good faith; and has been an actual and continuous resident upon his homestead, with his wife and children since the year 1886; and has built a large dwelling house and a large barn and other structures, and has made other improvements; all of the value of \$1,500; and that he has made a comfortable living for his family upon the land.

For the foregoing reasons your office decision of May 10, 1894, is hereby reversed. Marquam's contest will be dismissed, and Waisanen's final homestead entry will be held intact.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

CHILDS *v.* FLOYD.

The possession of land lying within the overlapping limits of The Dalles Military Wagon Road Company, and the Northern Pacific Railroad Company, and covered by the forfeiture act of September 29, 1890, acquired with a view to purchasing said land from the Wagon Road Company, does not entitle the holder to perfect title thereto under the second clause of section 3 of said act.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
April 6, 1896. (W. M. W.)

I have considered the case of Rubert H. Childs *v.* William Floyd, on the appeal of the latter from your office decision of January 23, 1895, holding for cancellation his cash entry for the S. $\frac{1}{2}$ N. $\frac{1}{2}$ and N. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 23, T. 2 N., R. 14 E., The Dalles, Oregon, land district.

On January 19, 1893, William Floyd made application to purchase the lands in question under the act of September 29, 1890 (26 Stat., 496), alleging that he settled thereon in 1887, and that he had been in possession thereof up to the date of his application; that he settled on said lands "with the expectation of purchasing the same from the Northern Pacific Railroad Company, if they should obtain title to the same."

On April 10, 1893, his application was allowed, and he made cash entry of said land.

On February 14, 1894, Rubert H. Childs filed his corroborated affidavit of contest against said entry, alleging:

That said land has not been in the possession of said William Floyd or any one else for the past two years further than to have a fence on three sides inclosing about

four miles square, in which several different persons own lands, as also the government of the United States have lands within said inclosure which has not been disposed of.

That the north side of said pretended inclosure has never been inclosed, and this affiant is ready and willing to prove that on Sept 30, 1890, or prior thereto or since said time, that the said William Floyd was not in possession of said land or had any contract to purchase from the Northern Pacific Railroad Company or from any other person or persons that would entitle him to purchase said land from the government. That if this affiant is allowed he will be able to prove that the said William Floyd has never complied with the law entitling him to purchase said land from the government, and that the said William Floyd has never been in possession of said land excepting in common with others, and that he has not now nor has not had any improvements upon said lands excepting a fence across the west end of said land, being a part of the fence that inclosed the said four mile square tract.

This affidavit of contest was forwarded to your office, which, on March 15, 1894, ordered a hearing thereon. The hearing was duly had, and on August 6, 1894, the local officers recommended that the contest be dismissed.

Childs appealed.

On January 23, 1895, your office reversed the decision of the local officers, and held Floyd's entry for cancellation.

Floyd appeals.

The land in question is within the limits of the grant to the State of Oregon for the benefit of The Dalles Military Road Company (14 Stat., 409), and which overlaps that of the grant to the Northern Pacific Railroad Company under the act of July 2, 1864 (13 Stat., 365), and was covered by the forfeiture act of September 29, 1890 (26 Stat., 496).

Appellant contends that the affidavit of contest fails to state a cause of action, and, therefore, the case should be dismissed.

The affidavit states, in effect, that the land in question has not been in the possession of Floyd for the last two years, further than being inclosed on three sides by a fence, inclosing about four miles square, in which were several different persons owning lands, as well as government lands; that the defendant was not in possession of said land or had any contract to purchase the same from the Northern Pacific Railroad Company, and has never been in possession of said land, excepting in common with others, etc., etc.

While the charges are somewhat loosely and indefinitely drawn, still I am of opinion that they are sufficient to constitute a cause of action.

The evidence shows that prior to the passage of the forfeiture act, several other persons owned, controlled and resided upon lands within the same inclosure with the land in question. Said inclosure embraced all of sections 22, 23, 26, 27, 28, 35, and parts of sections 21, 32, 33, and 34, in the same township. Some of these lands were owned by persons who did not occupy them. It clearly appears that the object of Floyd and others in inclosing the lands was to use them for the purposes of pasturing and grazing stock thereon, and not with a view of purchasing them from the Northern Pacific Railroad Company. It

is equally clear that prior to the forfeiture, Floyd never exercised the exclusive right of possession of the land in controversy, but it was used in common with others as pasture.

The evidence shows that Floyd never resided on the land covered by his cash entry. There is no evidence tending to show that he held the possession of the land in question under deed, written contract with, or license from the Northern Pacific Railroad Company. He testified that he had the permission of The Dalles Military Road Company to fence the land, and that he intended to purchase it when it should come into market.

Floyd's cash entry was allowed upon his statements that he settled on the land in 1887, and had since been in full and peaceable possession of the same; that he settled said lands "with the intention of purchasing the same from the Northern Pacific Railroad Company, if they should obtain title to the same." His entry was evidently allowed under the second clause of section 3 of the act of 1890, *supra*, which provides:

Or when persons may have settled said lands with *bona fide* intent to secure title thereto by purchase from the State or corporation, when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States at any time within two years from the passage of this act.

By the act of June 25, 1892 (27 Stat., 59), this provision of section 3 of said act of 1890 was amended to extend the time within which persons actually residing upon lands forfeited by the act of 1890 might be permitted to purchase such lands at any time within three years from the passage of said act.

By Public Act No. 8, 54th Congress, approved January 23, 1896, not yet carried into the Statutes at Large, Congress amended the act of September 29, 1890, and acts amendatory thereof, as follows:

That section three of an act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

In the case of James C. Daly, 17 L. D., 498, the Department held that the right to purchase from the government forfeited railroad lands, accorded by section 3 of the act of September 29, 1890, and the amendatory act thereto of June 25, 1892, to those "who may have settled said land with *bona fide* intent to secure title thereto by purchase from the

State or corporation," cannot be exercised by one who has not established his residence on said lands.

In view of the conclusion I reach in this case upon the evidence submitted, it is not necessary to discuss the cases of James C. Daly, 17 L. D., 498; O'Leary v. Smith, 17 L. D., 542; Shafer v. Butler, 19 L. D., 486; or determine what construction should be placed on the amendatory act of 1896, *supra*.

At the trial Floyd testified as follows, respecting his intention at the time he took possession of and inclosed the lands in question:

In chief:

What was your intention when you took possession of the land with respect to acquiring title to it?

A. I expected to buy it whenever it came into market. . . .

Q. At the time you inclosed this land, what, if any, arrangement did you have with the Dalles Military Road Company relative to holding their land?

A. They allowed me to fence it with the understanding that I would buy it when the title was settled. . . .

On cross-examination:

Q. Are you the owner of the Dalles Military Road land inside of your inclosure?

A. I have a patent from the Dalles Military Road Company; I paid them for it, and they gave me a patent, with the exception of the south half of the south half of section 23; I had liberty from them to fence it.

Q. Then you are now the owner of two sections and a half of Dalles Military Road lands, are you not?

A. I am.

This is all the evidence in any way tending to show Floyd's intention at the time he fenced and took possession of the land involved, and when taken altogether shows that at that time he intended to purchase the land of the Dalles Military Road Company, when said company might see fit to sell it. There is nothing in the evidence to show that he changed such intention or intended to purchase the land of the Northern Pacific Railroad Company at the date of the act of 1890. The act of September 29, 1890, *supra*, does not accord to settlers who settled on what they supposed were lands belonging to the Dalles Military Road Company the right to purchase such lands. It only applies to—

all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted, etc.

The 3d section of said act gives the right of purchase,

When persons have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress.

However bona fide and good Floyd's intention may have been, at the time he fenced said land or at any other time, to purchase it of the Military Road Company, when it secured title and wanted to sell it,

such intention would not avail him under the most liberal construction of the act of 1890, *supra*. Said act was intended to protect and accord the right of purchase to all such as could bring themselves within its terms, and at the same time open the forfeited lands to disposition, as provided in the act, to claimants under the homestead law.

For these reasons, Floyd's entry must be canceled, and your office decision must be, and hereby is, affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—NOTICE.

CLELAND *v.* VASQUEZ HEIRS;
and
COLLIER *v.* VASQUEZ HEIRS.

In a proceeding against a homestead entry on the charge that the entryman died leaving no heirs, or beneficiaries under section 2291, R. S., the administrator of the entryman's estate is not entitled to notice of the hearing.

If the evidence in such a case shows that the entryman died without having earned the land, and that there are no beneficiaries entitled to succeed to his interest the entry should be canceled.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 7, 1896. (J. A.)

The land involved herein is the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 12 S., R. 2 E., S. B. M., Los Angeles, California, land district.

January 24, 1890, Refugio Vasquez made homestead entry for said tract. March 10, 1893, L. Theodora Cleland filed an affidavit of contest against said entry. This affidavit was held insufficient by the local officers who returned the same to the contestant, allowing her ten days within which to make the charges more specific.

March 11, 1893, the local officers allowed David C. Collier Jr. to file an affidavit of contest subject to the rights of Cleland to proceed against the entry. The affidavit filed by Collier alleges:

That the said Refugio Vasquez died about the 15th of November, 1890, has wholly abandoned said tract, and changed his residence therefrom for more than six months since making said entry, and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law.

March 29, 1893, Cleland filed an amended affidavit of contest alleging:

That the said Refugio Vasquez died about the middle of November, 1890, and left no heirs, as he repeatedly stated prior to his decease, and also that during the more than two years that have elapsed since said decease, that no heirs of any class have laid any claim to said above described land.

On this affidavit the local officers issued notice of hearing to be had June 8, 1893, on testimony to be taken before the county clerk of San Diego county, at San Diego, California, May 30, 1893.

Notice was served by publication. With the proof of service the contestant filed the affidavit of Horace H. Cleland to the effect that on April 12, 1893, he served a copy of the notice of hearing personally on John Falkenstein, administrator of the estate of Refugio Vasquez, deceased.

May 30, 1893, the contestant submitted testimony showing that Vasquez died in November, 1890, and that he had no relatives. On the same day the attorney for John Falkenstein entered a special appearance for the purpose of protesting against the introduction of testimony on the ground that "John Falkenstein, administrator of the estate of Refugio Vasquez, deceased, has not been legally notified to appear at the time and place set for taking such testimony." No affidavit was filed in support of the protest.

November 2, 1893, the local officers rendered decision recommending the cancellation of the entry. November 23, 1893, David C. Collier filed an appeal from said decision, to your office.

November 24, 1893, John Falkenstein filed a motion for a review of the decision of November 2, 1893, on the grounds:

- (1) That no notice of hearing was served on him.
- (2) That the question raised by Cleland's affidavit of contest has become *res judicata* by reason of the dismissal of a former contest brought by her on the same ground.
- (3) That under the laws of the State of California sufficient time has not elapsed to bar the heirs of Refugio Vasquez from appearing and laying claim to the land.

In his affidavit filed in support of the motion Falkenstein alleged that he is the administrator of the estate of Refugio Vasquez, deceased, and that no notice of hearing was served on him.

February 3, 1894, the local officers set aside their decision of November 2, 1893. February 12, 1894, they issued a notice allowing the administrator to submit evidence on March 28, 1894, before the county clerk of San Diego county, to be considered on final hearing April 2, 1894.

March 28, 1894, Falkenstein submitted testimony showing that he was public administrator of San Diego county on January 16, 1891, on which day he was appointed administrator of the estate of Refugio Vasquez; that the estate consists of the land in controversy; that he has made some effort to find heirs to the estate of Vasquez, but has found none; that on account of the contest he has not made any great effort to find heirs; and that about twenty days after his appointment as administrator of the estate he put a man in possession of the land. The contestant did not appear at that time, as she mistook the date set for final hearing for the date of submitting testimony. After offering his testimony Falkenstein moved the dismissal of the contest on the ground, in substance, that the contestant's testimony taken May 30, 1893, can not be considered, as it was taken without notice to him.

April 2, 1894, the contestant appeared before the county clerk and submitted testimony showing that the man who was put in possession of the land by Falkenstein died more than two years before the hearing; that no one claiming title by descent from Vasquez has ever cultivated the land; and that she has been in possession of the land and has been cultivating the same for about two years.

April 5, 1894, before the testimony offered by Cleland April 2nd, was received by the local officers, they rendered decision as follows, after making a statement of the facts, and specifically referring to Falkenstein's testimony to the effect that he had put a man in possession of the land:

Possession by the administrator is possession by the heirs (6 L. D., 672 and the cases therein cited), and as in a former contest by the same contestant, against the said entry, it was held in letter "H" of January 6, 1892, that "the question as to whether there are any heirs living competent to make final proof can only arise upon an attempt to submit such proof," which decision was affirmed by Departmental decision of December 15, 1892, forwarded by letter "H" of December 29, 1892, we must recommend that said contest be dismissed, and our former decision of November 2, 1893, is revoked.

May 4, 1894, Cleland filed an appeal from said decision.

November 16, 1894, your office considered the case on the appeals of Cleland and Collier, the appeal of Collier having been filed November 23, 1893, as above stated, and dismissed Collier's contest on the ground that the charges contained in his affidavit, hereinbefore set out, are insufficient. As to Cleland's contest said decision holds as follows:

It appears that on March 16, 1891, Cleland filed a prior contest against said entry, alleging the death of the entryman and that he left no known heirs. By letter "H" of Jan. 6, 1892, said contest was dismissed for the reason that "the question as to whether there are any heirs competent to make final proof can only arise upon an attempt to make such proof."

In this (the present) contest the nature of the charges are not explicit—whether the want of heirs or default as to improvement and cultivation on the part of the heirs.

On May 30, 1893, Cleland appeared and submitted testimony tending to show that there are no living heirs competent to take and on said grounds it was determined (in her prior contest) that contest would not lie, by letter "H," of Jan. 6, 1892.

On April 2, 1894, she appeared and testified that there had been no acts of cultivation or improvement for or by the administrator for two years last past, and another witness testified to the same effect. It being shown that there are no heirs and there being no acts of cultivation or improvement by the legal representatives for the period alleged, a cancellation of the entry would be warranted on account of failure to improve.

The testimony, however, cannot be considered other than as *ex parte* affidavits and not as evidence in the case on account of the failure of Cleland to appear and submit the same on the date set therefor. The allegations, however, are sufficient to order a further investigation, it appearing that the failure of Cleland to appear on March 28, 1894, was due to conflict of dates, and she evidenced her good faith by appearing with her witnesses on April 2, 1894.

The local officers were therefore directed, in the event of the dismissal of Collier's contest becoming final, to proceed *de novo* after due

notice to the heirs and legal representatives, on the charge of failure to improve and cultivate the land.

The appeals of Collier and Cleland from said decision bring the case before me for consideration.

Collier contends that the contest of Cleland should be dismissed, and that he should be allowed to contest the entry. Cleland assigns error, in substance, in not holding the entry for cancellation and awarding her the preference right of entry.

Collier's appeal does not merit discussion. The decision appealed from is affirmed in so far as it dismisses his contest.

Under the rules of practice it was necessary for Cleland to serve notice of contest, directed to the heirs of Vasquez, by publication. She has complied with this requirement. I see no reason for holding that the administrator of Vasquez' estate must also be served with notice. Administrators or executors have no right or authority in reference to the claims of deceased homesteaders except, in case of the death of both father and mother, for the benefit of infant children. Sec. 2292 R. S. In a contest brought against a homestead entry on the charge that the entryman died, leaving no heirs, the administrator of the entryman's estate is not entitled to notice of hearing, as under the allegations made he has no interest to defend, and is not a proper party to the case. Falkenstein can therefore not be heard in defense of the entry.

Under Sec. 2291 R. S., in case of the entryman's death his widow, and in case of her death his heirs or devisee may make final proof. It seems that the contestant used the word *heirs* in its general sense, intending to charge that there is no beneficiary under said Sec. 2291. The beneficiaries, if there are any, have been duly summoned under the general name of *heirs*.

The testimony introduced May 30, 1893, shows nothing more than that the entryman was "all alone"; that he was born in Mexico; and that he frequently said he had no relatives at all. As the entryman had the right to devise the land this testimony, considered by itself, is not sufficient to warrant the cancellation of the entry. From the fact that the administrator appeared and on March 28, 1894, testified that he had found no heirs, and made no reference to any will, it seems that the entryman did not devise the land. Although the administrator was not a proper party to the case I see no reason why his testimony should not be considered in connection with the contestant's testimony. I therefore find that the entryman died leaving no beneficiaries under Sec. 2291 R. S.

The entryman was not at the time of his death entitled to a patent for the land. His heirs, if there are any, could not acquire title to the land except under the provisions of Sec. 2291 R. S. The provision of the Civil Code of California that non-resident alien heirs have five

years within which to appear and claim property which they take by succession has therefore no application to the case at bar.

I have examined the record in the prior contest brought by Cleland against this entry and find that your office did not dismiss that contest on the holding, as stated in the decision appealed from, that "the question as to whether there are any heirs living, competent to make final proof, can only arise upon an attempt to submit such proof." The affidavit of contest, filed March 16, 1891, alleged that the entryman died in November, 1890, leaving no known heirs, and that he had abandoned the land for more than four months prior to his death. It will be observed that this affidavit did not charge that the entryman left no heirs, but only that he left no *known* heirs. This allegation was insufficient. The only charge on which the entry could have been canceled was that of abandonment, which the contestant failed to prove.

The local officers rendered decision recommending the cancellation of the entry on the finding that the entryman died leaving no heirs. On appeal your office correctly held, January 6, 1892, that the only issue presented was that of abandonment, and as the testimony did not sustain the charge of abandonment the decision of the local officers was reversed and the contest dismissed. It was incidentally stated that "the question as to whether there are any heirs living, competent to make final proof, can only arise upon an attempt to submit such proof." On Cleland's appeal the decision of your office was formally affirmed. It was not necessary to discuss the case and to express dissent from the statement above quoted. That statement was not sanctioned by the Department. It was, on the contrary, out of accord with the departmental decisions on the question. In the case of Peter W. Bennet, 6 L. D., 672, a relinquishment, executed by the administrator acting under order of the probate court on the finding that there are no heirs, was held to be sufficient evidence to warrant the cancellation of a homestead entry. See also Richard Clump, 3 L. D., 384, in which case a homestead entry was canceled before the expiration of the statutory period for the submission of final proof, on the showing that there were no beneficiaries under Sec. 2291 R. S. It follows that your office erred in holding that the question of failure of heirs can arise only upon an attempt to submit final proof.

As the testimony shows that there are no beneficiaries under Sec. 2291 R. S., the entry should have been held for cancellation. The decision appealed from is accordingly reversed.

RAILROAD RIGHT OF WAY—RESERVATION IN PATENT—LOCATION.

FLORIDA CENTRAL AND PENINSULAR R. R. CO. *v.* BELL ET AL.

In issuing patents under the public land laws for lands over which a railroad right of way exists, such right may be reserved, in the absence of statutory provisions operating to protect said right of way.

The location of a right of way across a reservation, wherein the grant is confined to such right of way, operates to exhaust the right of the company so far as the rights of others are concerned; and if such location, on the subsequent construction of the road, is abandoned, the rights of adverse claimants will not be embarrassed by reserving a right of way, on the line as constructed, in the patents issued to such claimants.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 7, 1896. (G. B. G.)

The Florida Central and Peninsular Railroad Company has appealed from your office decision of November 4, 1895, holding that a reservation of right of way should not be inserted in certain patents to be issued to homestead and preemption claimants for lands within the boundaries of what was the Fort Brooke military reservation, in the Gainesville land district, Florida, over which said company has a line of constructed road.

By departmental decision of July 24, 1894, in the case of *Mather et al. v. Hackley's Heirs* (on review, 19 L. D., 48), these lands were awarded to the parties in interest, as follows:

To the heirs of Lewis Bell, deceased, lot 8, Sec. 24, T. 29 S., 18 E.

To the widow of Edward T. Carey, deceased, lots 9 (and 10), same section, township and range.

To Frank Jones, lot 15, Sec. 18, same township and range.

Martha Stillings (now Turner), widow and heir of Andrew Stillings, deceased, lot 12, Sec. 19, same township and range.

To Julius Caesar, lot 13, Sec. 19, same township and range.

The history of these lands, pertinent to the issue now presented, is, briefly, as follows:

In March, 1824, that portion of the Fort Brooke reservation in which the lands are situated was occupied under instructions from the War Department, by United States troops in cantonment, and was so reserved until December, 1830, when it was formally reserved by executive order, in which its limits were fixed at sixteen miles square. On January 4, 1883, they were relinquished by the Secretary of War, and restored to the public domain.

The respective rights of the defendants in interest, as fixed by departmental decision aforesaid, were initiated by homestead and preemption filings, or applications to file pre-emption declaratory statements as of the following dates:

The heirs of Lewis Bell, by declaratory statement of said Bell, now deceased, filed March 30, 1883.

Lizzie W. Carew, widow of E. S. Carew, by the homestead entry of said Carew, made March 22, 1883.

Frank Jones, by application to file declaratory statement on April 5, 1883.

Martha Stillings, widow and heir of Andrew Stillings, deceased, by application of the said Stillings to file declaratory statement on April 25, 1883.

Julius Cæsar, by application to file declaratory statement on April 23, 1883.

The grant to the Florida Central and Peninsular Railroad Company was made by act of Congress, May 17, 1856 (11 Stat., 15). The company filed its map of definite location on December 14, 1860, but it was not approved until January 28, 1881, for reasons not necessary to consider, the railroad company being without blame, and therefore lost no rights by the long delay.

The act of May 17, 1856 (*supra*), granted to said company every alternate section of land designated by odd-numbers, for six sections in width on each side of said road, for several lines, among which was one "from Amelia Island, on the Atlantic, to the waters of Tampa Bay."

The question here involved arises under the last proviso of the granting section, and is as follows:

And provided further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads or branch through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States.

It appears that the road was built, but in crossing the reservation aforesaid the line of constructed road deflects from the line of definite location, just how far does not appear, but it appears to have been a considerable distance, conceded *in arguendo* to be more than two hundred feet, but within the lateral limits of the grant, if by operation of law these lines extend across the reservation. The line of definite location does not touch the lands in controversy, except at a point on lot 16 where it crosses the line of constructed road at a large angle.

The appeal and answer raises a number of questions, some of which are frivolous, and some of which are *res judicata*. Stripped of all these, there are two questions of controlling importance.

1st. In crossing the Fort Brooke military reservation was the company authorized to deflect its line of constructed road from its line of definite location, and as subsidiary to this, could it do so where rights had attached under the homestead and pre-emption laws to the lands affected thereby, after definite location and in advance of construction?

2d. If the road has a right of way over these lands, should this right be reserved in the patents to be issued to the owners of the land?

Inasmuch as an affirmative conclusion on the second question must be reached to make a consideration of the other necessary, it will be considered first.

In the case of the Pensacola and Louisville Railroad Company, 19 L. D., 386, this question was considered at length, although presented in a somewhat different aspect. The question there presented was, whether lands over which a railroad company had a grant of right of way, subject to forfeiture for failure to build its road, could be patented to claimants under the public land laws, in the absence of a declaration of forfeiture of the right of way. On this question it was therein held (syllabus):

A statutory grant of a railroad right of way is a grant of an easement, and the lands over which the right of way is located may be disposed of by patent to others, subject to whatever right the company may have in the same, and it was said in that decision:

Your office is advised to issue patents for the land affected by the Louisville and Pensacola Railroad grant, reserving in general terms such rights as the company may have in the same by virtue of said grant.

To reach this conclusion it was held by necessary implication that the company was entitled to a reservation of its rights in the patent. If this be true of a railroad company, where right of way is subject to forfeiture, it is true *a fortiori* of a company who has complied with the conditions of the grant.

In the case of *ex parte* Mary G. Arnett (20 L. D., 131), it was held that a claim reserving the right of way should not be inserted in final certificate of entry and patent for land over which a right of way has been granted under the act of March 3, 1875, where it appears that there has been a breach of the conditions imposed by said act, but no re-assertion of ownership by the government. This was put on the express ground that the fourth section of said act provided, that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way," that therefore the rights of the railroad company (if it had any) were protected by statute, and the case of the Pensacola and Louisville railroad company (*supra*) was in this regard distinguished.

In the case at bar there is no question of forfeiture for failure of the conditions subsequent, and the public land laws under which these patents will issue do not in terms protect the company's rights. I am, therefore, of opinion that if the plaintiff company has a grant of right of way across said reservation on the line of its constructed road, and is not estopped from asserting that right by its own acts, the limitation asked for should be incorporated in the patents.

On the first question it is contended by the company that by operation of law the lines of the lateral limits of its grant are extended across the reservation for the purposes of a right of way, that it had a right to build its road anywhere within such limits, and that in crossing the reservation its road was built within such limits.

There can be little doubt as a general proposition that a railroad may deviate in construction from its line of definite location, rendered necessary to avoid engineering obstacles or remedy defects in the original location, not destroying the identity of the road constructed with the one located and confined within the limits of the grant, and that the right of the company to the lands conferred by the grant will not be defeated thereby. It was so held by the supreme court, in the case of *Van Wyck v. Knevals* (106 U. S., 360), and by the decision of Secretary Lamar in the Chicago, St. Paul, Minneapolis and Manitoba Railway Company (6 L. D., 209), in which the law and decisions governing this question are reviewed at length. But unless it be concluded that the lateral lines of the company's grant are extended across the reservation in question, then an analogous application of this rule to a right of way only would confine the company to the limits of its line of definite location, the width of which, in the absence of statutory designation, would be confined to such territory as the necessities of the road require, and any further deflection would be an abandonment of its definite location, and therefore of its right of way.

The cases cited are not in point on this question, and no decision has been cited by counsel which is conclusive or even persuasive of the soundness of the contention here made, nor have I been able to find an authority on the precise question here involved. There does not appear to be any good reason for extending these lateral lines. It would serve no other purpose than to secure to the company the right to change its line of constructed road a distance of six miles on either side of its line of definite location, and thus practically reserve from disposition a tract of land, twelve miles wide, until the company has actually constructed its line, or render uncertain the title of every man who makes entry of any of said lands. I do not believe that Congress so intended. A right of way was granted over this reservation on any line the company might select. Until this selection was made it was the duty of the government to take no steps that would interfere with the free exercise of this right. The selection was made in this case by filing a map of definite location. The right granted had then been exercised and exhausted, so far as the rights of others are concerned.

In the case of *Smith v. Northern Pacific Railroad Company* (58 Federal Reporter, 513), in which was involved the question of the right of said company to deflect its line of road from its line of definite location under a grant of right of way by the act of July 2, 1864 (13 Stat., 217), it was held:

The fact that railroads frequently deviate from their lines of definite location, as fixed on their maps, is no ground for inferring that Congress intended that the right of way should follow the constructed road, and not the line fixed on the map, for the act, while providing for such deviation by giving the company the right of eminent domain, by its other provisions indicates a purpose to have the railroad actually constructed on the line fixed by the map, and to limit the right of way granted to the two hundred feet on each side of that line.

It is contended by counsel for the company that this case is in direct conflict with the decision of the supreme court in the case of *Railroad Company v. Baldwin* (103 U. S., 426), and should not therefore be relied on.

I do not so understand the *Baldwin* case. At the date of the grant to the plaintiff company in that case the land in controversy was vacant and unoccupied land of the United States. *Baldwin* acquired whatever rights he possessed two years prior to definite location. The company contended that *Baldwin* took the land subject to the right of way; *Baldwin* contended that the grant of the right of way took effect only from the date at which the company filed its map designating the route with the Secretary of the Interior. The court said:

The act of Congress of July 23, 1866, makes two distinct grants; one of lands to the State of Kansas for the benefit of the St. Joseph and Denver City Railroad Company in the construction of a railroad from Elwood in that State to its junction with the Union Pacific *via* Maryville; the other of a right of way directly to the company itself.

But the grant of the right of way, by the 6th section, contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms.

The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed.

We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.

It is evident that the court had under consideration a very different case from the one here presented. There was no deflection of line from definite location. The road was actually constructed on the line selected by the company, and approved by the Department. The case does not hold anything except that such a grant "is absolute and *in presenti*, and a party subsequently acquiring a parcel of such lands takes it subject" to the right of way.

The case at bar is different in two important particulars. The homestead and pre-emption claimants herein do not seek to acquire title to lands over which a railroad company has selected its right of way by map of definite location, nor did the company build on its line of definite location. That the grants of right of way and of lands in aid of the construction of plaintiff company's road were grants *in presenti*; that these grants were a float until the line of the road was definitely fixed, and that then the selection of the lands and of the right of way was made thereby, and the right to lands and easements thus selected vested in the company as of the date of the grant, are propositions well settled. See *Railroad Company v. Dunmeyer*, 113 U. S.; *St. Paul and Pacific R. R. Co.*, 139 U. S., and cases cited. But these principles do not sustain the contention of the plaintiff company herein. The grant of right of way to the Florida Central and Peninsular Railroad across the Fort Brooke Reservation was a grant *in presenti*, and attached on definite location as of the date of the grant, but it did not attach to the whole reservation. The map of definite location was a designation of the lands selected for the purposes of the right of way, and the company's right attached to these lands as of the date of the grant, and by this act all other lands within the reservation were released from the company's claim. If the government were the only party in interest, the same cogent reasons would not exist for invoking a strict interpretation of the law, inasmuch as it would make no difference to the government at what point the railroad crossed the reservation, but I am of opinion that the company has no legal right to materially deflect its road from its line of definite location, and where adverse rights have attached to lands affected thereby, the land department will not embarrass the remedy of the legal title holders of such lands, against the company in the courts, by making reservations of rights of way in the patents to be issued to the owners of the land.

Your office decision is affirmed.

ABANDONED MILITARY RESERVATION—FORT ABRAHAM LINCOLN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 19, 1896.

REGISTER AND RECEIVER,
Bismarck, North Dakota.

GENTLEMEN: The appraisal of the lands in the Fort Abraham Lincoln abandoned military reservation has been approved by the Secretary of the Interior.

The lands on this reservation are subject to disposal under the act of August 23, 1894, (28 Stat., 491). See circular December 1, 1894, (19 L. D., 392).

On April 9, 1895, (30 L. D., 303), the Secretary directed this office to issue instructions under said act of August 23, 1894, as follows:

That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of interest upon deferred payments be charged at the rate of 4 per cent. per annum.

A copy of said appraisal has been filed in your office, and upon the request of entrymen you will inform them at what rate the lands entered by them have been appraised.

In allowing entries for lands in this reservation you will, in each case, endorse on the applications "Fort Abraham Lincoln Reservation, Act of August 23, 1894," and make the same annotation on your abstract of homestead entries.

Under the provisions of the homestead law, an entryman has the right either to commute his entry after fourteen months from the date of entry, or offer final proof under Sec. 2291, R. S. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months with full payment in cash or, after submitting ordinary five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof, without interest, or he may make payment in five equal installments, the first payment to be made one year after the acceptance of his final proof, and subsequent payments to be made annually thereafter, interest to be charged at the rate of 4 per cent. per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after fourteen months from date of entry you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event that regular final proof is made, and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of the principal and interest paid, reporting the same in a special column of the abstract of homestead receipts, and at the time the last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers, you will make the proper annotations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers land in the Fort Abraham Lincoln Reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service, applies to entries under the said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs the entrymen elect to make payment for the lands entered in five annual installments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made you cannot charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in installments, you will not give said proofs current numbers and dates, but will, if they are acceptable to you, make proper notes on your records showing that satisfactory proof has been made and the dates upon which the partial payments must be made, and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure the payment of the installments, but if, when each installment is due, any entryman fails to pay the same you will report the matter to this office when proper action will be taken in the case.

By letter "C" of January 28, 1896, you were directed, under instructions from the Secretary of the Interior, not to allow entries for lands in Sibley Island, which is a part of this reservation. You will observe said instructions until further orders.

The official plats show that the lands in said Island embrace lots 5 and 6, Sec. 29; lots 7, 8, 9, 10 and SW. $\frac{1}{4}$, Sec. 28; lots 1, 2, 3, 4, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 32; lots 2, 3, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 33; lots 5, 6, and 7, Sec. 34, T. 138 N., R. 80 W., and lots 12 and 13, Sec. 3; lots 6, 7, 8, 9, 10 and 11, Sec. 4; lots 1, 2, 3, 4, 5, 6, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 5; lots 9 and 10 Sec. 8, and lot 5, Sec. 9, T. 137 N., R. 80 W.

There is now pending in Congress a bill proposing to grant to the State of North Dakota for educational purposes all, or so much as belongs to the government, of sections 11, 12, 13, 14, 23 and 24, T. 138 N., R. 81 W., together with the buildings thereon.

You will therefore not allow any entries for lands in said sections.

The line of the Northern Pacific Railroad, in North Dakota, was definitely located from Fargo to Bismarek, May 26, 1873, and from Bismarek to the Little Missouri River, July 20, 1880. The terminal between these two locations passes through townships 137 and 138 N., ranges 80 and 81 west, wherein said reservation was located. Such lands of the reservation as lie east of said terminal and were included in the original reservation of February 11, 1873, were excluded from the railroad grant. The balance of the land lying east of the terminal (those embraced in the reservation as enlarged) were not so excluded by reason of the reservation, and the claim of the railroad company thereto must be adjudicated in the usual manner.

All the lands lying west of said terminal and included in the reservation, either as originally established or enlarged were excluded and excepted from the railroad grant.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Approved, April 10, 1896.

JNO. M. REYNOLDS,
Acting Secretary.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

OSBORN ET AL. v. KNIGHT.

The erroneous denial of an asserted right of purchase under section 5, act of March 3, 1887, and recognition of intervening adverse claims, will not preclude subsequent supervisory action on behalf of the applicant, if the lands involved are yet within the jurisdiction of the Department.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 10, 1896. (F. W. C.)

Under date of October 1, 1895, upon a motion for re-review of departmental decision of March 3, 1893, not reported, filed on behalf of John H. Knight, the facts relative to certain lands in Sec. 35, T. 48 N., R. 4 W., and Sec. 3, T. 47 N., R. 4 W., Ashland land district, Wisconsin, involved in the case of A. R. Osborn *et al.* v. John H. Knight, were reviewed.

This land is within the limits of the indemnity withdrawal made under the grant of June 3, 1856 (11 Stat., 20), to aid in the construction of the Bayfield branch of the road now known as the Chicago, St. Paul, Minneapolis and Omaha railroad.

By the act of May 5, 1864 (13 Stat., 66), the grant of 1856, before referred to, was increased from six to ten sections per mile, and a new grant was also made of ten sections per mile to aid in the construction of the road afterwards known as the Wisconsin Central railroad. Upon the location of the last mentioned road, the land in question was included within the primary limits of said grant and was also found to be within the four miles additional grant for the Omaha road, so that it is within the common ten miles limit of the two grants under the act of 1864.

Under the rulings of this Department, made prior to the decision of the supreme court in the case of the Wisconsin Central railroad company v. Forsyth (159 U. S., 46), it was held that lands within the indemnity limits under the act of 1856 were excepted from the grant made by the act of 1864, so far as the Central company is concerned. This was the ruling which prevailed at the time of the adjustment of the Omaha grant, and the land in question was held to have been excepted from the Central grant, because of said reservation for indemnity purposes under the act of 1856.

On October 25, 1889, Knight filed an application to purchase land within the sections first described, under the provisions of section five of the act of March 3, 1887 (24 Stat., 556), alleging that he had purchased the land from the Wisconsin Central railroad for a valuable consideration. Protests were filed against the acceptance of Knight's proof, by A. R. Osborn *et al.*, and upon the record made in said controversy your office found that Knight was not a *bona fide* purchaser for the reason that it was shown that he had been register of the local office at Bayfield, and was, therefore, apprised of the condition existing

between the two grants and must have had knowledge of the fact that these lands had been reserved for the Omaha grant prior to the date of the passage of the act making the grant for the Central company and the location thereunder, which decision was sustained by this Department in the decision of March 3, 1893 (not reported).

A review of this decision was denied March 3, 1894, not reported. Following the decision of the supreme court in the case of the Wisconsin Central railroad *v. Forsyth, supra*, in which it was held that the reservation for indemnity purposes on account of the Omaha grant did not prevent the attachment of rights under the Central grant, a motion for re-review was filed on behalf of John H. Knight, which was considered in departmental decision of October 1, 1895 (not reported).

In said decision it was held:

As before stated, Knight's application to purchase was denied, and the supreme court having held that the title to said land is not in the United States, a review of that part of the decision can avail nothing.

But in view of the fact, that the recent decision of the court reversed the previous decision of this Department as to the rights of the Wisconsin Central R. R. Company within the conflict before referred to, and of the further fact that entries have been allowed on these lands under the previous ruling, I have directed that these entrymen be called upon to show cause why their entries should not be canceled, to the end that in case there is no reason shown for holding the lands to have been excepted from the Wisconsin Central grant, otherwise than the fact that they were within the indemnity withdrawal under the act of 1856, the conflicts may be cleared from the record. The previous holding of the Department that the withdrawal under the act of 1856 served to defeat the grant under the act of 1864, for the Wisconsin Central railroad company, in view of the decision of the supreme court in the case before referred to, must be recalled and vacated, and the rights of the Wisconsin Central railroad, within said conflict, must be adjudicated in accordance with the decision of the supreme court before referred to.

Acting under the directions given, it appears that those who had been permitted to make homestead entries of the lands covered by the former application by Knight were called upon to show cause why their entries should not be canceled, to which, all except one, it appears, responded.

In considering the showings made your office decision of February 12, 1896, found that the lands in question are opposite and coterminous to the constructed part of the Wisconsin Central railroad, but that certain of the lands were excepted from said grant by reason of the existence of pre-emption filings at the date of the attachment of rights under said grant. As to the land not so included, it is held that the same passed to the Central grant, but as to those tracts covered by filings, it is held that the same are excepted from the Central grant. In the matter of the latter class the question of the respective rights of the entrymen and Knight, under his application to purchase made in 1889, as before stated, is further considered, and it is held that in the light of the recent decision of the supreme court, before referred to, the knowledge of which Knight is held to have been apprised by reason

of his position of register, cannot be held to affect the *bona fides* of his purchase from the Wisconsin Central railroad company, and said application to purchase is, as to the said lands, re-instated and recommended for allowance, and the conflicting homestead entries held for cancellation.

From said decision the entrymen appeal, alleging that the matter of Knight's right under his application to purchase is *res adjudicata*, and that Knight's motion for review was in effect denied by the decision of October 1, 1895, quoted from.

While the decision referred to fails to consider Knight's motion, so far as affects his application to purchase, it was not the purpose thereof to adhere to the decision denying his claimed right of purchase, but rather to treat the case as though this question was eliminated, it appearing so far as then shown by the record before me, that Knight was fully protected under his purchase of the company.

It must be apparent from the recitation heretofore made that the reservation for the Omaha grant in nowise affected the attachment of rights under the Central grant, so that Knight's knowledge of such reservation in nowise affected the *bona fides* of his purchase from the Central company, and were it not for the filings of record at the date of the attachment of rights under the Central grant, Knight would be fully protected by reason of his purchase from the Central company.

Certain of the lands covered by his application to purchase under the act of 1887 were, as before stated, excepted from the Central grant, by reason of subsisting pre-emption claims of record at the date of the attachment of rights under the Central grant.

As to such lands, Knight's application to purchase must prevail.

He purchased the lands of the Central company for a valuable consideration, and whether before or after the passage of the act is not material. (*Baleh v. Andrews et al.*, 22 L. D., 238.)

He duly applied to purchase under the act of March 3, 1887, and made proof as required.

The conflicting entries were all initiated subsequently to his application to purchase.

He did all that was necessary to protect him in his rights, and the fact that he was erroneously denied such right, and others allowed to make entry of the lands applied for, cannot be successfully pleaded as a sufficient reason to prevent the reconsideration of the matter and the re-instatement of Knight's application, the lands still being within the jurisdiction of this Department. In the case of *Knight v. U. S. Land Association* (142 U. S., 178), it was held:—

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The

obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

No appearance having been made on the part of the pre-emptors whose filings were of record, uncanceled, at the date of the attachment of rights under the Central grant, the same will not interfere with Knight's purchase.

I therefore affirm your office decision, and direct that upon completion of entry by Knight, the conflicting homestead entries be canceled.

PRACTICE—CONTESTANT—COSTS—INTEREST OF THE GOVERNMENT.

HEGGEN v. FLOYD.

A contest instituted under section 2, act of May 14, 1880, and prosecuted until the charge as laid therein is apparently established should not be dismissed on the contestant's refusal to make further advances for the costs, but treated thereafter as between the government and the entryman.

A contestant who, after the submission of his own testimony, declines to pay the further costs of the case, is without interest in the controversy, and has no standing to complain of the refusal of the local officers to recognize him in the subsequent proceedings.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 14, 1896. (W. F. M.)

On April 10, 1891, Bessie Olson, now Mrs. Floyd, made homestead entry of the NE. $\frac{1}{4}$ of section 13, township 105 N., range 76 W., within the land district of Chamberlain, South Dakota, and on July 18, 1894, Andrew Heggen filed an affidavit of contest charging abandonment, change of residence for more than six months and failure of settlement and cultivation as required by law, and undertook to pay the expenses of a hearing.

The hearing was begun and proceeded until the contestant had submitted his testimony, when, according to the record the following proceedings occurred:

The contestant having rested, paid the costs under Rule 55, and having fully established all the charges made, now gives notice that the claimant, if she desires to make any defense, must do so at her own expense, and the contestant declines to pay any further expense in the taking of testimony.

To which the register and receiver state that this case was commenced, notice issued and the testimony taken, thus far wholly and exclusively under Rule 54, and has been done so and was so done under the oath of the contestant filed in this case that he would pay the costs in this case; and if he refuses to pay any costs in the case, as far as this contestant is concerned, the case will be promptly dismissed, and at the same time claimant is notified that she will be allowed to present such testimony as she may desire to show her residence, improvements of good faith, in connection with her homestead entry.

Under the ruling the contestant still refuses to pay any of the further costs of the hearing.

Whereupon comes the claimant, and states to the Hon. register and receiver that the affidavit for contest being such as to place the same under Rule 54, and she understanding that the examination herein would proceed under that rule, has made no arrangements to raise money to take testimony in this case; that she is a poor woman, and has just recovered from a long spell of sickness, and is at this time utterly unable to obtain the means to pay for taking down any testimony in the case; but being desirous of fully showing and establishing her residence, occupancy and cultivation in good faith of her claim, now asks that this examination be postponed for ten days to enable her to raise the money necessary to pay the expenses of taking testimony. She states that this motion is induced by reason of the surprise caused by the extraordinary change of base by the contestant.

In view of the extraordinary action of the contestant's attorneys at this time, the claimant will be allowed a continuance to put in such testimony as she may desire in support of her entry, and the case is continued for that purpose until the 22nd day of November, 1894, at the hour of 9 o'clock A. M.

To the dismissal of the case and the refusal of the register and receiver to further recognize the contestant or his attorneys in this case, or permit cross-examination of claimant and her witnesses, the contestant duly excepts.

The contestant appealed from the action of the register and receiver in dismissing the contest so far as he was concerned, and has prosecuted a further appeal here from the decision of your office affirming that of the local office, *pro tanto*, but holding the latter to have been ousted of its jurisdiction, and that there was, therefore, no authority for further proceedings thereafter.

Pursuant to the ruling of the register and receiver the testimony of the contestee was taken, however, and is a part of the record, though it was not considered by your office, and by their letter of November 26, 1894, after a review of all the proceedings had in the case, and having considered the testimony submitted by both parties, they recommended that the entry of Mrs. Floyd be allowed to remain intact.

The contention of the appellant is fully presented in his third and fourth specifications of error, as follows:

There was error in holding that the contestant in this case did not have the legal right to prosecute this contest under rule of practice No. 55.

And:

Contestants have under the law and rules of practice the exclusive right to determine under what rule of practice they will prosecute and there was error in the Commissioner determining for this contestant that his contest was and could be prosecuted only under rule of practice No. 54.

The case of *Hansen v. Nilson et al.*, 20 L. D., 197, the latest expression of this Department on the question, is similar in many of its facts to that under consideration, and appears, *in arguendo*, to sustain the view of the contestant.

Where a contest, [it is said there] commenced under Rule 54, has been sustained by the testimony offered by the contestant, the claimant is put upon his defense whether the contestant claims the preference right or not. If at any stage of the proceedings prior to closing his case the contestant waives the preference right of entry, or if he should decline to pay the cost, as required by Rule 54, the case should proceed as if it had been commenced under Rule 55. There is no rule to

force contestant to pay all costs of the proceeding if he should waive the preference right of entry, and if he should refuse to pay all cost as required by Rule 54, he would then forfeit the preference right, and the government would continue the prosecution of the case if the testimony submitted by the contestant showed that the claimant had failed to comply with the law.

It is to be observed, however, that it is not said that the contestant shall be permitted to continue as the prosecutor of the case, but that "the government would continue the prosecution of the case." The theory of the case is more fully disclosed in the paragraph following that last quoted:

The government is a necessary party to every proceeding under a contest, and it is the duty of its officers to guard and conserve its interests as they may appear. Where a contestant at any stage of the proceeding drops out of the case, leaving a record of testimony clearly showing that the entry should be canceled, it is the duty of the government to act upon it and to cancel the entry, and to restore the land to the public domain.

The precedent cited goes no further than to establish the rule that a case instituted under the second section of the act of May 14, 1880, and proceeded with until the allegations of the affidavit have been apparently sustained, should not be dismissed, though the contestant refuse to make further advances for costs, or do any other act indicating his retirement from the case as its responsible and active prosecutor. Plainly, the rule thus announced, and it is an eminently proper one, arises out of the obligation devolved by law upon this Department to guard the interests of the government as they relate to the public domain, however and wherever those interests may appear.

In the case at bar, however, the register and receiver did not dismiss the case absolutely, but only in so far as the contestant was concerned. Having refused to make further advances for the expense of the hearing, and thereby forfeited the preference right awarded him by law in the event of a favorable issue of his suit, he was no longer a party in interest. The issue was left between the government and the entryman, and in behalf of the former the local officers proceeded with the case to its end, and upon the whole record, rendered a decision in favor of the latter. While it is true the action of the register and receiver in refusing to further recognize the contestant or his attorneys appears to have been somewhat arbitrary, it is not shown that the government has suffered any injury, and in view of the manifest bad faith of the contestant as evidenced by his abrupt and unexplained change of attitude, this action is not without excuse. And in any event, it is to be observed, finally, that he is without standing to complain, being without interest in the controversy.

The Department has not the benefit of the judgment of your office upon the merits of the case, but it is not thought necessary to remand it on that account. The testimony has been carefully examined, and I concur in the conclusion of the local officers, who had the witnesses before them, that there is no reason for disturbing the entry, which will, therefore, be permitted to stand.

HOMESTEAD CONTEST—SETTLEMENT RIGHT—GOOD FAITH.

KEELER *v.* LANDRY.

A homestead entry made with full knowledge of the prior settlement claim and improvements of another, and with intent to take advantage of the impoverished condition of such claimant, is wanting in good faith, and will be canceled, although such adverse claimant may have failed to assert his right within the statutory period.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
April 3, 1896. (C. J. G.)

I have examined the record in the appeal of Rene Landry from your office decision of March 8, 1895, holding for cancellation his homestead entry for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and lots 3 and 4 of Sec. 30, T. 30 N., R. 57 E., Spokane land district, Washington.

The evidence discloses the fact that while the contestant may have been guilty of some negligence in the matter of perfecting his entry within the statutory period, yet the contestee has not shown that good faith which the law requires of settlers on the public lands. The contestee had full knowledge of contestant's settlement and improvements, and he evidently took advantage of contestant's impoverished condition.

In *Rector v. Gibbon* (111 U. S., 276), the supreme court, speaking of the system of public land laws, says:

Its aim has been to protect those who in good faith have settled upon public land and made improvements thereon, and not those who by violence or fraud or breaches of contract have intruded upon the possessions of original settlers and endeavored to appropriate the benefit of their labors. There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice.

In *Johnson v. Johnson* (4 L. D., 158), it was said (syllabus):

The wrongful act of an entryman, whereby the settlement rights of another claimant for the same tract, were not protected by filing or entry, will not be allowed to inure to the benefit of such entryman.

All the facts in the case at bar, taken together, warrant the conclusion reached by your office.

Your said office decision is hereby affirmed.

HOMESTEAD CONTEST—SECOND CONTESTANT.

STRANSKY *v.* SHAUT.

The right of a second contestant to a judgment on the charge as made by him and established by the evidence, can not be defeated by acts performed with a view to curing the alleged default after such contest is filed, but before notice thereof, and pending the disposition of a prior collusive contest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) April 14, 1896. (J. L.)

This case involves the NE. $\frac{1}{4}$ of section 14, T. 104 N., R. 70 W., 5th principal meridian, Chamberlain land district, South Dakota. On April 5, 1890 Lizzie A. Shaut made homestead entry No. 56 of said land. And on October 6, 1890, she procured leave of absence for one year.

On July 13, 1894, John A. Stransky filed his affidavit of contest against said entry alleging:

That the said Lizzie A. Shaut has wholly abandoned said tract, and changed her residence therefrom for more than six months since making said entry, and next prior to the date herein; and that said tract is not settled upon and cultivated by said party as required by law.

A hearing was had beginning September 19, and ending September 24, 1894. On September 28, 1894, the local officers recommended that the contest be dismissed.

On appeal, your office on February 21, 1895, affirmed said decision, dismissed Stransky's contest, and held Shaut's entry intact. Stransky appealed to this Department.

It appears that when Stransky's affidavit of contest was filed, there was pending against said entry a contest initiated by one Henry F. Thompson which was set for hearing on August 8, 1894. Neither party appeared; the contest was dismissed; and notice for a hearing of Stransky's contest was issued, and served on the entrywoman the same day, to wit: August 8, 1894. When under cross-examination Miss Shaut was asked: "State if said Thompson did not file a contest against your claim on the ground of abandonment, and if you did not or Mr. Sanborn for you, pay Mr. Thompson the sum of fifty dollars not to appear?" She refused to answer the question. All the facts and circumstances disclosed in the recorded testimony justify and compel belief that Thompson's contest was friendly and collusive.

The evidence shows by a clear and palpable preponderance, that Miss Shaut never did at any time establish and maintain her residence in good faith on the land; and that she never did settle upon and cultivate said tract as required by law: That her infrequent visits to the land were made merely to keep up a color of residence.

In the year 1890 she bought from one William Martin for \$200 the

house upon the land, which was situated within ten rods of a much traveled public road, about two miles from the town or village of Pukwana. The contestant proved by four witnesses, near neighbors, living in sight of her house, who passed the house frequently, some twice a day going to and returning from Pukwana, some twice and some three times a week, that from September 1890 to July 1894, the house was uninhabited. That the doors and windows were closed with shutters and a storm door. That there were no lights at night, nor fires nor smoke by day; and no indications either inside or outside of the house, of human habitation. That Miss Shaut instead of being resident, a neighbor and an acquaintance, was a stranger, whose person was unknown even by sight to those who lived nearest to the house.

According to her own testimony: She was an unmarried woman about thirty nine years old, and by trade a seamstress, milliner and mantua maker: In the year 1890 she spent eight days upon her claim: On October 6, 1890 she procured leave of absence for one year: It was then probably that she battened up the doors and windows: In the fall of 1891 she was on the place at intervals; "altogether probably between two and three weeks": Between October 17 and November 22, 1891, "I sewed in town at Pukwana for different parties": From November 22, 1891 to February 1, 1892, she was at the Taft House in the town of Chamberlain sewing; during which period she says: "I think I went out to Pukwana on a Saturday train and remained until Monday evening and returned to Chamberlain to the Taft House; but I did not go to the claim": During the year 1892, according to a memorandum of dates kept by her on the door casing in the house, she was on her claim at intervals about forty four days in all: During that year she carried on business as a milliner and mantua maker in Pukwana; worked late in the evenings; and "mostly nights and Sundays were spent on the claim:" During the year 1893 she spent on the claim eighteen days; "four days in March, seven in May, and as many in August, counting the time between the dates that I remember:" She spent the rest of the year 1893, in the town of Aberdeen about one hundred and fifty miles away from the land, with the exception of about ten days of May, which she spent in Pukwana, selling some millinery goods which she brought from Aberdeen: Her last visit to the claim in 1893 occurred sometime between August 20, and August 30; on which last day she returned to Aberdeen where she stayed until February 14, 1894: on February 15, 1894, she went to her claim, and stayed all night; and on the 16th she returned to Aberdeen: She did not again visit her claim until after Stransky had on July 13, 1894, filed his serious affidavit of contest now under consideration.

After the testimony touching the merits of the case had been taken, Miss Shaut was recalled as a witness by her attorney for the purpose of testifying:

(1). That on August 8, 1894, when Stransky's notice of hearing was

served upon her, she was on her claim, (2) that she had arrived there on July 16th; (twenty-three days before the service, but three days after the filing of Stransky's affidavit of contest); and (3) that she had no knowledge of Stransky's contest until August 8, 1894.

When asked on cross-examination, "if when you returned to the claim, on the 16th of July, you knew that a man by the name of Thompson had contested your claim?", she refused to answer the question.

In view of the facts palpably proved in this case it is impossible to believe that Miss Shaut returned from her business in Aberdeen to her claim on July 16, 1894, in ignorance of the two contests pending against her entry, with intent in good faith to abandon the manner of life to which she was accustomed and in which she was successful, to become a farmer, a cultivator of the soil, a bona fide permanent resident on a homestead in the country.

So also the testimony of Miss Shaut herself is sufficient to prove the contestant's second allegation to wit: that said tract was not settled upon and cultivated by her in good faith as required by law, during four and a half years.

On page 44 of the testimony Miss Shaut says:

In the year 1890 there was corn, potatoes and millet put in, but nothing gathered on account of drouth. During the year 1891 there was no crop. (She had leave of absence). In the year 1892, I had the land all plowed and seeded to wheat, but raised nothing on account of a partial drouth. In 1892 I received in wheat a few bushels more than were planted. In the year 1893 I had the land also plowed and some breaking done, and seeded to wheat again. From 24 acres of land I received two and a fraction bushels of wheat. I made arrangements in the month of February (1894) to have the land plowed in the spring, and planted to corn; but on account of drouth or dry weather it was not done.

Your office erred in holding that Miss Shaut by returning to the land on July 16, 1894, condoned or cured the default which was palpably proved. In the case of *Eddy v. England* 6 L. D., 530, this Department held as follows:

It is the duty of the local officers to receive an affidavit of contest when another contest is pending and to hold it subject to the disposition of the first contest. It is not within the power of the contestant to fix the date of the hearing, nor can he know when the hearing will be had. All that he is required to allege is that the failure exists at the time the affidavit of contest is made. This affidavit dates from the time it is received at the local office. The affidavit of contest (in that case) was made September 9; and was duly presented to the local office and should have been received, although no further action thereon could have been taken until the prior contest was disposed of; and it will be held to take effect from that date.

This case is quoted and approved in the cases of *Farrell v. McDonald* 13 L. D., 105, and *Westenhaver v. Dodds* 13 L. D., 196, and it is the settled law of this Department.

The careless use of a word which has no technical meaning apart from its general sense, probably led your office into error. According to Rules of Practice 1, 2 and 3, a contestant *initiates* his contest against an entry by filing his corroborated affidavit of contest containing apt

allegations and applying for a hearing. Rules 4, 5 and 6 prescribe by whom and how hearings may be ordered. Rules 7 and 8 prescribe the form of notice of the hearing to be issued. These are functions of the public officers. Rules 9 to 14 inclusive regulate the mode of serving the notice, and Rules 15 and 16 prescribe the mode of "proof of service of notice." When the contestant shall have served the notice prepared and signed by the local officers, and shall have furnished them with the required proof of such service; or, when the contestee, without notice, voluntarily appears, (as was the case in *Heptner v. McCartney* 11 L. D., 400), then and not till then, do the local officers acquire jurisdiction of and over both the parties and the case. Then their jurisdiction is initiated. Necessarily, the beginning of the contest must precede acquisition of jurisdiction to hear and decide it. The interval of time is always appreciable, and is often considerable.

Your office decision is hereby reversed. Stransky's contest is sustained; and Miss Shaut's homestead entry will be canceled.

HOMESTEAD—ACT OF JUNE 15, 1880.

MCBRIDE *v.* BUTLER ET AL.

A cash entry under the act of June 15, 1880, allowed on the affidavit of the entryman's attorney in fact will not be disturbed, where, after transfer of the land, the entryman refuses to make the personal affidavit required by the regulations.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 24, 1896. (W. M. W.)

I have considered the appeal of W. W. Holmes, transferee, from your office decision of August 11, 1890, denying his motion to remove the suspension of the cash entry of William J. Butler for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 31, T. 5 S., R. 22 W., Colby land district, Kansas.

On February 27, 1879, William J. Butler made homestead entry of the land involved, and on June 5, 1884, he made cash entry of it under the act of June 15, 1880, through his attorney in fact, Lester V. Davis.

Butler's cash entry was suspended by your office on April 18, 1885, for the reason that the required affidavit was made by a person other than the entryman, and the local officers were directed to allow the party sixty days in which to file the required personal affidavit.

On July 23, 1886, the local officers rejected the application of Levi L. McBride to contest Butler's entry on the charge of abandonment, for the reason that after final certificate has been issued a hearing can only be ordered by your office.

By letter of March 26, 1887, the local officers reported to your office that the entryman had been duly notified of the suspension of his entry and had taken no action in the matter.

On April 22, 1887, your office, in view of Butler's failure to comply

with the requirement contained in your office letter of April 18, 1885, held his entry for cancellation and held McBride's application to await the result of said action.

On July 5, 1888, the local officers transmitted to your office a motion by W. W. Holmes to remove the suspension of said cash entry, and asking to be heard in defense of his interests as transferee of the entryman Butler. He supported his motion by an affidavit, in which he shows that he purchased the land in question from William E. Crutcher in good faith without any knowledge, directly or indirectly, of any fraud or defect in making the cash entry, or that it had been suspended; that he paid \$625 for it; that Butler had left the country and Holmes could not ascertain his whereabouts. Whereupon he asked that the requirement of your office letter of April 18, 1885, be withdrawn. He also submitted an abstract of title to the land in question, which shows the issuance of the final receipt on June 5, 1884, to Butler; a warranty deed from Butler and wife, executed by their attorney in fact, Lester V. Davis, dated June 6, 1884, to William E. Crutcher; a warranty deed from said Crutcher, single, to Frank L. Sheldon, dated July 7, 1884; and a warranty deed from said Sheldon and wife to W. W. Holmes, dated December 14, 1885.

On March 21, 1888, the local officers reported to your office that due notice of your office action of April 22, 1887, had been given the proper parties, and no further action had been taken.

On April 11, 1888, your office closed the case, and canceled Butler's entries.

Leaving out some intervening entries of the land in question which were all canceled prior to July 16, 1892, on that date one George F. Breon made homestead entry of the tract involved, which entry remains intact upon the records of your office.

On September 1, 1894, the local officers forwarded a motion for review of your office decisions of April 22, 1887, and August 11, 1890, on the grounds that neither Holmes nor his attorneys had been notified of said decisions, or had an opportunity to appeal therefrom.

On November 24, 1894, your office found: "That the notice of office decision of August 11, 1890, was not served upon Holmes' attorneys as it should have been, and was never received by him," and allowed Holmes to appeal from said decision of August 11, 1890, within sixty days, upon serving notice upon George F. Breon, the present entryman.

Holmes appeals.

In view of the conclusion I reach, it is not necessary to set out and discuss all of the errors assigned by the appellant, as such a course would prolong this opinion to an unusual length.

One error specified is as follows:

Said ruling is contrary to subsequent rulings of the Department, and the said cash proof so made in the name of said William J. Butler was improperly canceled.

In the case of George T. Jones, 9 L. D., 97, it was held that a cash entry under the act of June 15, 1880, allowed on the affidavit of the entryman's attorney, will not be disturbed, when, after transfer of the land the entryman refuses to make the personal affidavit required by the regulations. This case was cited and followed by the Department in *McFarland v. Elliott*, 11 L. D., 587.

The required affidavit in this case was made by Butler's attorney in fact and his cash entry allowed thereon. One of Holmes's attorneys filed an affidavit in support of Holmes's application in which he states, *inter alia*, that after long and diligent search he ascertained that Butler resided in Washington Territory; that Butler refused to make the personal affidavit required, unless Holmes would pay him an additional amount of money for the land involved.

From an examination of the whole record in the case, I am of opinion that it clearly comes within the rule announced in the Jones, *McFarland v. Elliott* cases, *supra*.

McBride's application to contest Butler's entry was properly rejected by the local officers.

Your office decision appealed from is accordingly reversed. Breon will be notified to show cause why his entry should not be canceled, and upon his failure to show proper cause, his entry will be canceled and Butler's entry reinstated and passed to patent.

ACCOUNTS—DEPUTY SURVEYOR'S CONTRACT.

GEORGE W. PEARSON.

A deputy surveyor's claim for compensation on account of the retracement of old lines in order to secure a starting point for the work in hand, cannot be recognized, where it does not appear from the field notes that such action became necessary in the absence of evidence of the former surveys; nor can the failure of the field notes to show the necessity for such retracement be made good by a supplemental statement.

In the adjustment of an account under a deputy surveyor's contract the Commissioner of the General Land Office is authorized to make a deduction of five per cent from the agreed compensation, if the work is not performed within the stipulated time, and no extension of such time is granted or applied for.

That the expense of a survey is payable from the repayment fund provided for in the act of July 2, 1864, does not take the adjustment of the account out of the rule authorizing a deduction from the agreed compensation when the work is not done within the stipulated period.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896. (W. M. B.)

This is an appeal by contracting deputy surveyor George W. Pearson, from your office decision of September 7, 1894, and also from that of December 22, 1894, re-affirming your said former office decision, wherein was disallowed certain charges or items contained in said deputy's

account for the retracement of certain specified lines run and established in previous surveys, which retracements appellant alleges were authorized by contract No. 90, dated June 2, 1892, and special instructions thereunder, relative to surveys to be executed in T. 14 N., Rgs. 9 and 10 E., California; exception is also taken to the deduction of five per cent. from the amount charged by the deputy for the surveys accepted and approved by your said office, for the reason that the same were not completed within the time stipulated in the contract.

Appellant files assignments of error, which being substantially stated are: (1) that it was error to hold that the retracements of lines for which payment was disallowed, was not necessary to find the starting point from which to run certain lines necessary to the completion of the surveys designated in the contract; (2) that it was error to hold that the deputy was not fully authorized to retrace or resurvey all such lines of approved official surveys, "in such cases as he (the deputy) shall find to be necessary to the proper completion of the new survey, proper,"; and (3) that there is no law or authority for deducting five per cent., from the amount properly chargeable by the deputy, upon the ground that the survey was not completed within the time stipulated in the contract.

In answer to said allegations of error, it may be observed that while deputy Pearson was authorized in a general way to determine whether the retracement of certain lines run in the former or original survey became necessary in order to find or discover the locus of the starting point from which to run the lines that were considered essential to the completion of the survey under contract No. 90, still the authority of said deputy to make such retracements or surveys was specially defined, and limited or restricted, by special instructions, which were, under existing law, as much a part of the contract under which the deputy executed the work therein designated as if they had been therein embodied, and the dispensableness or indispensableness of making such retracements depended entirely upon contingencies or conditions which could only become discernible or determinable by examination in the field as described in and regulated by said special instructions, and expressed in the following words, to-wit:

You will make only such retracements and resurveys of former approved official lines as may be found by you to be absolutely essential to the proper completion of the new surveys to be made by you as authorized, for which work you will be allowed the maximum rates per mile, viz: \$15 for township and range lines, and \$12 for section lines; the same rates to be allowed for all retracements or resurveys found by you, as before said, to be absolutely essential to the correct completion of the new work, all payable from the special fund named in the contract.

The lines, if any, which may be found necessary to be rerun or retraced in order to re-establish your beginning or closing points must be specifically described in the field notes of the new surveys, and the necessity therefor clearly set forth; as also the fact that no evidence of such former approved surveys were found, and that the line or lines of alleged original official surveys as shown by the field notes and diagrams furnished you by this office, are either fictitious or have been obliterated; also that a faithful search has been made therefor.

Great care must be exercised in order to prevent, if possible, needless retracements or resurveys, hence the requirements providing for detailed statements of the necessity and search for lines in question; all of which information must be embodied in the field notes of the surveys, provided for in your contract.

Thus it appears that the authority or discretion conferred upon the deputy in the first paragraph of said instructions is qualified, explained and restricted by the words of the second. These instructions should be considered as a whole and when so considered are readily understood, and any experienced deputy surveyor would find no trouble in comprehending and carrying them out according to their true intent.

To

make only such retracements and resurveys of former approved official lines as may be found by you (the deputy) to be absolutely essential to the proper completion of the new surveys,

as set forth in the first paragraph, clearly meant that only such retracements were to be made to find the required corners in the former or original surveys, for starting points, the locus of which could be ascertained or discovered by no other method than that of retracement or resurvey of the lines in the old survey.

The instructions, in cases where the true *situs* of the old corners could not be ascertained and determined by the regulation markings at the proper point, contemplated the finding of the locus thereof by the bearing trees or other objects with the aid of the official field notes of the original survey, and the diagram of the old survey showing a protraction of the lines thereof to aid in the new survey which had been furnished the deputy for his guidance in the field.

It now becomes a matter of the first importance to determine whether the requirements of these instructions were observed, and the valuable information furnished by the official field notes and diagram of the former surveys was made available, by the deputy in the execution of his work, wherever possible and practicable to the end of preventing "needless retracements."

For that purpose reference must necessarily be had to the field notes of the new survey. Turning to page 3 thereof (Survey in T. 14 N., R. 10 E.), it is found, for example, that the deputy in order to run that portion of the line between sections 19 and 30 indicated by a red line on diagram, marked Exhibit "A" (hereto attached), went to the corner of sections 29, 30, 31 and 32 and ran thence, north, between sections 29 and 30 to find the corner of sections 19, 20, 29 and 30 as a point of beginning. The deputy found the corner to sections 19, 20, 29 and 30, and made the following entry with reference thereto in the book of field notes:

At this point (corner of sections 19, 20, 29 and 30) I find a partly decayed post, mark nearly obliterated. I reestablish it.

The deputy fails to make any reference in his field notes to the existence of any witness trees or other bearing objects at this point, as he

should have done. Nor does the evidence furnished by the field notes show that a "faithful search" was made to find said corner of sections 19, 20, 29 and 30 before making the above described retracement. If such examination had been made upon the ground in the locality of the corner the true locus of the old corner might have been ascertained by the "partly decayed post, marks nearly obliterated" and the witness trees or other bearing objects, and the corner post sufficiently identified to have obviated the supposed necessity—and saved the expense—of retracing the old established line between sections 29 and 30. The other retracements charged for, and disallowed, in T. 14 N., R. 10 E., as appears from the deputy's own field notes seem to have been as unnecessary for the proper completion of the new survey as the one above described.

One other illustration will be given of the unnecessary retracement, charged for by the deputy, in the same township, but in range 9. In the field notes the following entry is made, to-wit:

It is impossible to chain any part of the line from the $\frac{1}{4}$ sec. cor. bet. secs. 12 and 13 and the cor. to secs. 12 and 13 on the east boundary of the township. I therefore go to the cor. of secs. 1, 2, 11 and 12, and run S. 14° W. on a line bet. secs. 11 and 12. And at 40 chs. I find the $\frac{1}{4}$ sec. cor., which is a post 3 ins. square, 1 ft. above ground marked $\frac{1}{4}$ S. on W. face from which a white oak 16 ins. diam. bears N. 65° E., 39 lks. dist. marked $\frac{1}{4}$ S. B. T. . . . and at 80 chs. the cor. to secs. 11, 12, 13 and 14 which is a post $3\frac{1}{2}$ ins. square 1 ft. above ground marked T. 14 N., S. 12 on N. E.: R. 9 E., S. 13 on S. E.: S. 14 on S. W., and S. 11 on N. W. faces, from which

A black oak 14 ins. diam. bears N. 7° E. 80 lks. dist. marked T. 14 N., R. 9 E., S. 12 B. T.

A pine 20 ins. diam. bears S. $83\frac{1}{2}^{\circ}$ 80 lks. dist. marked T. 14 N., R. 9 E., S. 13 B. T.

A pine 30 ins. diam. bears S. 83° W. 133 lks. dist. marked T. 14 N., R. 9 E., S. 14 B. T.

A black oak 12 ins. diam. bears N. 51° W. 88 lks. dist. marked T. 14 N., R. 9 E., S. 11 B. T.

From this cor. I run
East on a blank line

Va. $16\frac{1}{4}^{\circ}$ E.

And at 40.15 chs. to the $\frac{1}{4}$ sec. cor. point.

Finding the cor. obliterated I established the locus thereof from bearing trees standing according to the official field notes.

Thus it appears that there was no necessity for the resurvey or retracement of the line established in the former survey—one mile in length—between the corner of sections 1, 2, 11 and 12, and the corner of sections 11, 12, 13 and 14, with a view of finding the locus of the $\frac{1}{4}$ section corner on the line between said sections 12 and 13, since the old established corner of sections 11, 12, 13 and 14 was not obliterated—a properly marked section corner post being found thereat in good condition—with regard to the correct locus of which there could be no possible doubt or uncertainty, since the said true locus thereof could have been verified by and ascertained from the four bearing trees in close proximity thereto, which were found standing in relative position, properly marked, according to description thereof as shown and noted in the transcript of the official field notes of the former survey.

This said corner—the locus whereof could have been found by diligent search, without the retracement above described—the deputy could have made available as a starting point from which to run the east half portion of the line between sections 12 and 13, and saved the trouble and unnecessary expense of resurveying the line between sections 11 and 12. It may be here observed that the deputy, in his field notes, did not show or even state the *necessity* for retracing the W. $\frac{1}{2}$ mile of the old line between sections 12 and 13, as required by instructions, only noting in his book of field work, as shown above, that he found the locus of the $\frac{1}{4}$ section corner on the south boundary line of section 12—to be used as a starting point from which to run the E. $\frac{1}{2}$ of said boundary line—“from bearing trees standing according to the official field notes.” No notation was made in the field notes of any search whatever for said $\frac{1}{4}$ sec. cor. previous to retracement of that portion of the line between cor. of secs. 11, 12, 13 and 14 and the said $\frac{1}{4}$ sec. cor. on line directly east thereof (Vide diagram marked Exhibit A). Had there been a “faithful search” therefor in the first instance the locus of said corner could, in all probability, have been found and used as a starting point, thus rendering needless the stated retracement of one and one-half miles of lines already mentioned. Conceding for argument sake that the said $\frac{1}{4}$ sec. cor. could not have been located without retracing the west half of said line between Secs. 12 and 13, still there can be no doubt but that the well marked cor. of Secs. 11, 12, 13 and 14 (only a half mile distant from said $\frac{1}{4}$ Sec. cor.) could have been easily located by a search therefor and used as a starting point from which to retrace that portion of the established line between Secs. 12 and 13, in order to find the $\frac{1}{4}$ Sec. cor. and extend said line from said point as provided in deputy’s contract, to the east boundary line of T. 14 N., R. 9 E. To complete the line between the last above named sections in such manner, would, as stated, involve the retracement of a half mile of old line to secure a starting point, which, in the completion of fragmentary surveys, such as are provided for in contract No. 90, is clearly a contingency of the contract, for which work it was not contemplated that the deputy should receive compensation, unless under the exceptional or specific conditions so minutely set forth in special instructions. A diagram, same as that hereto attached, whereon a delineation of the old and new surveys is indicated respectively by black and red lines, together with field notes of former surveys, were furnished the deputy to enable him to find the locus of old corners by search therefor before making retracements of old lines for such purpose.

A full and careful examination has been made of the field notes returned by the deputy for the surveys executed by him, and it appears therefrom that in most instances there was about as little necessity for rerunning, and justice in charging for such retracement of the old lines disallowed by your office and not herein described, as there was for retracing and charging for such work thereon of the lines herein-before specifically described.

The right to make retracement of old lines for the purpose of locating established corners for starting points, where such work became unavoidable and *absolutely necessary*, was provided for in the contract, but it was never intended to confer upon the deputy the privilege of expanding such right into a license to make as many retracements as he might think proper; but on the other hand he was cautioned to exercise "great care" to prevent "needless retracements or resurveys", and to make such "faithful search" for old corners as might obviate the necessity of rerunning any lines of the old survey which might not be necessary for the completion of the new survey.

When, however, it did become necessary to make retracement of established lines in order to find starting points in the new surveys it was required by the terms of the contract, embodied in the special instructions thereunder, as already stated, that such lines should "be specifically described in the field notes of the *new* survey", and the necessity for retracing the same "clearly set forth in said field notes, as also the fact that no evidence of such former approved surveys were found." It was also by the terms of the contract required that "faithful search" should be made for the old corner or corners prior to making retracements of said lines of the former survey to find the same, and that when the rerunning of a line or lines became necessary for such purpose that the field notes should show that such corner or corners of the alleged original official surveys, as shown by the field notes and diagrams furnished the contracting deputy, were either fictitious, or had been obliterated, and if obliterated that they could not be located from the bearing trees.

It cannot be claimed that the disallowed retracements were particularly described and the necessity therefor set forth fully and specifically as was required by instructions.

German to this particular branch of the case appellant's attorney alleges that:

The deputy in addition to his field notes, submitted under date of January 20, 1894, through the surveyor general a full and complete statement showing the necessity for the retracement and resurvey of each of these lines. To this report we invite attention, as it bears upon its face the stamp of fairness. *Vide* instrument hereto attached, marked Exhibit "B".

Commenting upon and in explanation of said statement the attorney says:

Those explanations show a full compliance with the special instructions. For these retracements and resurveys, he was to be allowed by the terms of his contract, the same as for other similar lines. He was required to specifically describe them and the necessity therefor, in his field notes. This he has done fully, *as amended by his report* referred to.

There is an admission in such contention and statement of the attorney that the field notes did not come up to the requirements of the instructions under which the deputy executed the work designated in the contract.

Your office had a right to name the conditions under which retracement of old lines would be recognized and approved, and the contracting deputy having undertaken to perform such work under the terms and conditions stipulated in special instructions, a failure on his part to note in the transcript of field notes every material fact which would furnish full and complete information with respect to the necessity of running any old line charged for was clearly a breach of his contract in that particular.

To furnish such information in a statement made many months subsequent to these retracements, though fully and satisfactorily explaining certain essentials which were omitted in the field notes, which is not admitted, will not be considered a compliance with instructions and as curing the particular defects in the manuscript of field notes returned by the deputy. The Manual of Surveying Instructions, as well as the expressed and specific terms of the special instructions, as already stated, required that all such information should be fully and accurately set out in the transcript of field notes, and not, by implication, elsewhere, during the progress and execution of the work in the field. It is not claimed that the deputy was unable, from any cause, to make a record in such manner of every fact appertaining to a proper execution of the field work and a full description thereof. He does not even make an effort to show why the field notes returned by him are so materially defective, and he should be the last one to complain of any seeming hardship or loss for failing to comply with instructions, with respect to the plain meaning of which there could be no reasonable doubt or mistake.

With regard to the deduction of five per cent. from the amount properly coming to the deputy under his contract, it cannot be denied that the surveys thereunder were not completed within the time stipulated in said contract, and that no extension of time was asked in which to complete the surveys.

Where such state of facts are shown to exist, your office is fully and lawfully authorized and warranted in making settlement of all accounts for surveys completed under such circumstances, as is provided in paragraph 6 page 223 Manual of Surveying Instructions, 1894, to be found in words following, to-wit:

When surveys are continued and executed beyond the time limited in the contract and the contract has expired, and there has been no properly granted extension of time thereto, the compensation of the deputy surveyor for the lines of survey executed after the expiration of the contract will be reduced, and said lines completed at such rates as the Commissioner of the General Land Office may in his judgment determine to be proper, taking into consideration the value of the work.

By an examination of the records of your office it is ascertained that the rule laid down in the above excerpt from the Surveying Manual, which under existing law forms a part of every surveying contract, was adopted and put in force generally by your office on May 23, 1893.

Shortly afterwards, to-wit, on June 17, 1893, upon adjustment of a surveying account of deputy Isaac M. Galbraith, by deduction of five per cent. therefrom, for surveys executed by him after the expiration of the time stipulated in his contract for the completion of the same, your office by letter, of said date, to the Surveyor-General of Washington, among other things, stated:

In the future a reduction at this (5 per centum) or a higher rate will be made in surveying contracts where the deputy fails to complete a survey within the expiration of the contract or the extension of time granted therewith.

It may be observed in this connection that although the referred to regulation was not embodied in the Surveying Manual until 1894—subsequent to date of approval of Pearson's contract,—still the rule therein enunciated, which was put in force and made applicable to all accounts adjusted after May 23, 1893,—prior to the acceptance of the survey executed by Pearson, and the adjustment of the accounts therefor,—was based upon a ruling—as far back as March 22, 1886—in the case of *ex parte* Geo. W. Baker et al. (4 L. D., 451) wherein it was held that:

The rate of payment stipulated in the contract cannot apply to work completed after the expiration of the time agreed upon. . . . where a contract stipulates that the work shall be performed within a given period, the rate agreed upon can only apply to work performed within that period; and for work done under such contract after the expiration of that period of time, the rate of payment must be governed by the value of the work, but in no case to exceed . . . the rate fixed in the contract.

Notwithstanding the fact that all legitimate cost and expense incident to these surveys are, by provision of the act of July 2, 1864 (13 Stat., p. 365, sec. 21) made payable from the repayment fund deposited by the Central Pacific Railroad Company, still in adjusting accounts in connection therewith the same rule, above enunciated, applies equally thereto as in cases where such cost and expenses are borne solely by the government and paid out of the regular annual appropriations made for the survey of the public lands, without reimbursement.

Thus it appears that your office had both authority and the warrant of precedent for deducting five per cent. from the mileage rate named in deputy Pearson's contract, or, which is the same thing, to deduct a like per cent. from the total amount properly coming to the said deputy, upon the ground stated; and it was left discretionary with the Commissioner of the General Land Office, when surveys were completed subsequent to the time specified as a limit for their execution, or the limit of an extension of time, to value the work and pay such rate as might seem just and reasonable, provided such rate did not exceed that stipulated in the contract. In the case at bar the mileage rate was reduced to ninety-five cents on the dollar, which adjustment your office was authorized to make.

Instead of the action of your office being unauthorized, as alleged by appellant, in making the stated reduction of the amount of his account,

such action appears to be sanctioned by the uniform practice of your office since May 23, 1893, in the adjustment of accounts for surveys completed in the manner stated, as in the case at bar, and especially in the absence of a satisfactory showing to the effect that the completion of the work was not delayed through any fault on the part of the contracting deputy, but by unavoidable and unforeseen causes. Deputy Pearson, as appears from the record, did not apply for an extension of time in which to complete the surveys under his contract, nor does he make a satisfactory showing why the same were not completed within the period therein named.

Upon this special branch of the subject appellant's attorney alleges and contends that:

Even if it could be held that the Commissioner had the right in any case to deduct five per cent., or any other amount from the sum found due the deputy under his contract, we submit that this is a case in which no deduction should be made.

The records show that it took the Land Department from June 2nd to October 1st to approve the contract and bond, and issue instructions to the deputy. This left him just three months, two of them in midwinter, to complete his work, which was located in the snow belt of the Sierra Nevada mountains, where it was impossible to work during that season.

The attorney concludes with the query:

Then why should the deputy be punished by the delay in the Land Department?

Admitting, as alleged, that the said instructions and authority to begin work upon the survey did not reach deputy Pearson until October 1, 1892, still there remained three months, as stated, before the expiration of time named—December 31, 1892—in his contract for the completion of the work. Why the deputy should claim that more time was required in which to finish this work does not appear, when as a matter of fact his own field notes show that the entire field work under his contract was executed within a period of thirty-one days, extending from January 21 to February 20, 1893 (inclusive of both dates), save about one day's field work to which reference will hereafter be made.

Leaving out of consideration the month of October, 1892, during which period these surveys might have been completed, there would naturally arise the inquiry why were not the same executed during the months of November and December following? No showing is made that the snow and weather conditions during those months were more unfavorable to field work than during the months of January and February, in which the work was commenced and completed, nor is it reasonable to suppose that such was the case.

The last entry made in field notes of work done under contract No. 90, was on February 20, 1893, save an entry made therein about seven months thereafter, to-wit, on September 25, showing that the missing $\frac{1}{4}$ section corners between sections 19 and 20, and between sections 5 and 6 had been reset. The field notes fail to show when the deputy went into the field and began to establish said corners, but it is sufficient for

the purposes of this case to say that the running of the lines necessary to the resetting of those corners could easily have been done in the course of a day, or less time perhaps, after the arrival of the deputy upon the field.

This disposes of the various questions presented by the appeal for consideration and determination. The deputy has, as a matter of fact, already received an amount of compensation in excess of the total estimate which was made of the probable cost of the surveys at the time the contract providing therefor was awarded, and further payment thereon is not denied for such reason, but upon the grounds hereinbefore given, which are considered good and sufficient, and your office decision refusing additional payment is therefore hereby affirmed.

TIMBER-CULTURE CONTEST—CONTESTANT.

DILLON *v.* BERGER.

The right to contest a timber-culture entry, on the ground of non-compliance with law, is not defeated by a showing that the contestant was employed to do the necessary work, and hence is not in a position to allege the default of the entryman, if it appears by the terms of such employment a special contract was made, providing that said work was to be paid for in advance, and was not performed for the reason that the payment was not made as stipulated.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 24, 1896. (W. M. W.)

I have considered the case of Patrick H. Dillon *v.* Louie Berger, on the appeal of the former from your office decision of January 8, 1895, dismissing his contest against the timber-culture entry of the latter for the SW. $\frac{1}{4}$ of Sec. 15, T. 26 N., R. 48 W., Chadron, Nebraska, land district.

On November 2, 1887, Louie Berger made timber-culture entry for the above named tract of land.

On February 12, 1894, Patrick H. Dillon filed an affidavit of contest against said entry alleging failure to cultivate or plant to trees, tree seeds or cuttings any part of said land between the second day of November, 1892, and the second day of November, 1893.

A hearing was ordered and had, at which both parties appeared and introduced their testimony.

On July 12, 1894, the local officers found in favor of the contestant, and recommended the cancellation of Berger's entry.

Berger appealed.

On January 8, 1895, your office dismissed the contest, and the contestant brings the case here on appeal from said decision.

The local officers and your office, in all material matters of fact, agree as to what the evidence shows. Under the evidence introduced at the trial there is no room for any difference of opinion as to what

the facts are, so far as they relate to the default charged in the affidavit of contest, for there is no conflict on this point. Your office found:

That the plaintiff's allegations are abundantly sustained; in fact, there is no denial of them and the defaults were not cured up to the day of the trial.

As matter of defense it is set up that the contestant was employed to plow ten acres of the land and plant the same to trees, during the year ending November 2, 1893, and that he failed to do the work, but reported during June and August, 1893, that he had complied with the terms of his contract.

The claimant lived without the state, and employed Mrs. Mollie Berger as her agent to attend to the land, and in the latter part of May or first part of June, 1893, Mrs. Berger, who lived in Cass Co., Neb., went to the land and employed the contestant to do the necessary work for that current timber culture year, for the sum of twenty dollars.

Mrs. Berger claims the money was to be paid when the work was done, while Dillon claims that it was to be paid in advance as soon as Mrs. Berger arrived home. He is corroborated in this statement by one witness who was present when she got into her buggy to depart and who heard her say that she would send the money just as soon as she got home. Dillon received in part payment some poles, valued at \$4, and the balance, \$16, was mailed to him by Mrs. Berger about the early part of February, 1894, and was returned with the statement that the land was contested. Dillon plowed ten acres of the land and did nothing else. He waited, according to his statement, for the payment of the money.

It is true that the law has not been complied with, but this contestant is not in a position to take advantage of the default, for his relations to the defendant were of a confidential character, and it was his duty to protect, instead of injuring her. This office will not countenance such a breach of good faith.

The contest is dismissed, subject to the right of appeal. So advise the parties.

Appellant assigns numerous errors in your office decision, *inter alia*, error: "In holding that contestant was not in a position to take advantage of claimant's failure to comply with the timber culture law." "In holding that contestant's relations with claimant were of a confidential nature." "In not holding claimant's entry for cancellation, after finding that she had failed to comply with the timber culture laws." "In holding that contestant was guilty of a breach of good faith toward claimant."

Under the law and the evidence in the case, Barger's entry must be canceled; there is no authority for allowing it to remain of record.

In the light of the testimony in the case, I am unable to see any just reason for dismissing Dillon's contest. The evidence utterly fails to show any artifice, fraud, or deception practiced by Dillon on the entrywoman, either directly or through her agent, by which she was misled and thereby failed to comply with the timber-culture law. The evidence simply shows that Dillon was hired by the agent of the entrywoman under a special contract to do the breaking, planting, etc. The contract was that Dillon was to have his pay in advance for such work. He received \$4.00 of it in trade and the remaining \$16.00 was to be sent to him right away on the return of the entrywoman's agent to her home, which she failed to do. Dillon broke ten acres of the land, and sowed six acres of it to millet, but this was not a waiver of his right to insist upon payment in advance for the additional work, in accordance

with his contract. The reason given by the agent of the entrywoman for not sending the remaining \$16.00 to Dillon on her return home was that the itineracy of her principal, the entrywoman, prevented her from getting the money to make the payment with. If this explanation be accepted as true in every respect, it would neither exonerate the entrywoman from the performance of her contract with Dillon, nor cast any blame on him for standing by and insisting on the terms of his agreement.

It was the duty of the entryman to see to it that the breaking and planting were done on the land involved by November 2, 1893; this she failed to do. Long after the time had elapsed for her to do these things, Dillon filed his contest affidavit. I am unable to perceive anything in Dillon's conduct that would or should deprive him of a plain right accorded him by law.

The order of your office dismissing Dillon's contest is reversed and the contest sustained, and Berger's entry will be canceled.

RAILROAD GRANT-INDEMNITY SELECTION-STATE SELECTION.

STATE OF WASHINGTON *v.* NORTHERN PACIFIC R. R. Co.

The failure of a railroad company to revise a list of indemnity selections in accordance with the order in the La Bar case relieves the lands embraced therein from the effect of prior selection.

Secretary Smith to the Commissioner of the General Land Office, April (J. I. H.) 24, 1896. (F. W. C.)

I have considered the appeal by the State of Washington, from your office decision of October 6, 1894, holding for cancellation its selection list No. 2, being selections made for the use and support of agricultural colleges, as to certain tracts described in your office decision, for conflict with the selections made December 22, 1888, as indemnity, by the Northern Pacific railroad company.

In its appeal the State alleged that the selections made by the company were not of the nearest available lands to the losses designated, which were lands in the Coeur d'Alene Indian reservation, Idaho.

Upon this question a report was called for March 4, 1896.

I am now in receipt of your office letter of March 26, 1896, wherein you state—

The Northern Pacific railroad indemnity selections, above referred to, were made in the North Yakima land district, for lands lost by the Coeur d'Alene Indian reservation in the State of Idaho, and in making the examination directed by you, it was ascertained that said indemnity list No. 17, was irregular and informal in character, inasmuch as the lost lands were grouped together in large bodies contrary to the rule in such cases, and furthermore that there is no evidence of record, that the Northern Pacific Railroad Company, have filed a re-arranged list as required. See *La Bar v. Northern Pacific Railroad Company* (17 L. D., 406).

In view of the large amount of time and labor required in making the report called for, involving the examination of over two hundred miles of the indemnity limits of said railroad, I have deemed it advisable to call your attention to the condition of the Northern Pacific R. R. indemnity selections, as above stated, before proceeding further with the examination.

If upon a further consideration of the question, it is deemed necessary to have the examination made, the matter will receive prompt attention and a report will be submitted as soon as possible.

In the La Bar case (*supra*), you were directed to—

Call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned in the manner prescribed, at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim.

The company having failed to comply with this order, your office erred in holding for cancellation the State's selection list for conflict with the company's selections. Your said office decision is therefore reversed, and the State's selections, if otherwise regular and legal, should be submitted for approval.

PATENT—ERRONEOUS DESCRIPTION—INTEREST OF THE GOVERNMENT.

NULL *v.* FISHER.

The inadvertent substitution of an adjacent tract in the final certificate and patent issued on the commutation of a homestead entry, requires no action for the protection of the government except the cancellation of that part of the original entry not covered by the patent.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896. (W. F. M.)

On November 2, 1863, Jabez M. Fisher made homestead entry of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 9, township 3 S., range 68 W., within the land district of Denver, Colorado, and on December 6, 1864, he commuted it to cash, but in the final certificate, through a clerical error, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ was substituted for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the error was perpetuated in the patent, which issued July 1, 1868.

On October 19, 1894, David Null filed in the local office, for transmission to your office, a petition setting out the facts respecting the error of description and praying that demand be made upon Miers Fisher, the devisee of the entryman, for the surrender of the patent and the reconveyance of the tract improperly embraced therein, to wit, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 9, and that in default of compliance with the demand, suit be instituted to cancel the patent. At the same time he presented his application to make homestead entry of the land.

The decision of your office, from which Null has appealed, denies the relief prayed for on the ground that no injury has resulted from the error either to the United States or to the petitioner.

If the final certificate had been made to follow the record and embrace the land covered by the original entry, a different and perhaps more difficult question would have been presented; for in that case the entryman would have been vested with an equitable title to forty acres of land and the legal title to one hundred and sixty acres; but since the inchoate right acquired has not ripened into a vested interest, the mere cancellation of that portion of the recorded entry not covered by the patent will suffice for the protection of the government, which, alone, has any standing to complain.

The decision appealed from is affirmed.

OKLAHOMA LANDS—SECOND HOMESTEAD ENTRY.

GEORGE WILSON'S HEIRS.

The right to make a second homestead entry conferred by section 13, act of March 2, 1889, does not extend to one who purchased the land covered by his first entry under the provisions of section 2, act of June 15, 1880.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896. (W. A. E.)

James D. Wilson, as the sole heir of George Wilson, deceased, has appealed from your office decision of April 12, 1895, holding for cancellation the latter's homestead entry, made May 10, 1889, for the NE. $\frac{1}{4}$ of Sec. 33, T. 16 N., R. 5 W., Kingfisher, Oklahoma, land district.

At the time of making said entry the said George Wilson filed a special affidavit, stating that he had made a former homestead entry for a certain tract in the Wa-Keeney, Kansas, land district, and "that the same was commuted under the act of May 20, 1862. Patent issued June 6, 1888."

December 20, 1893, George Wilson died, and on June 1, 1894, James D. Wilson, the son and sole heir of said deceased entryman, submitted final proof, on which final certificate was issued the same day.

When the proof came before your office for consideration it was discovered on examination of the General Land Office records that George Wilson's former homestead entry had not been commuted under the act of May 20, 1862 (Section 2301, Revised Statutes, U. S.), as alleged in his special affidavit, but that the land embraced therein had been purchased by him under section 2 of the act of June 15, 1880 (21 Stat., 237).

Your office thereupon directed the register and receiver to call upon the heir aforesaid to show cause why the present entry should not be canceled for illegality.

In response to said rule to show cause, James D. Wilson filed his own affidavit, alleging that he had been informed by his father that

the land in Kansas had been purchased under the commutation clause of the homestead act (Section 2301), and not under the act of June 15, 1880; that to affiant's personal knowledge the said George Wilson had settled upon and entered the land here involved with the bona fide intention of making it his home; that the improvements thereon are worth about \$700; and that good faith has at all times been manifested, by the entryman during his lifetime, and by his heir, the affiant, since the entryman's death.

By letter of April 12, 1895, your office held the entry for cancellation and it is from this action that claimant has appealed.

Section 13 of the act of March 2, 1889 (25 Stat., 1005), in regard to Oklahoma lands reads, in part, as follows:

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply): *And provided further*, That any person who, having attempted, but for any cause failed, to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

The clause in said section, "who made entry under what is known as the commuted provision of the homestead law," refers to section 2301 of the Revised Statutes, which provides that if a homestead settler does not wish to remain five years on the land covered by his entry, he may before the expiration of that time pay the minimum government price for said land, such commutation payment taking the place of the further residence and cultivation that would otherwise be required. This right of commutation depends upon prior compliance with the homestead law and can not be exercised in the absence of such compliance.

Purchase under the act of June 15, 1880, is not commutation, nor does the right of purchase under said act depend upon compliance with the homestead law. George E. Sandford, 5 L. D., 535.

The records of your office clearly show that the land embraced in George Wilson's first entry was purchased under the act of June 15, 1880. He therefore does not come under either of the special extensions of the homestead right contained in the thirteenth section of the act of March 2, 1889, and as his first entry exhausted his original homestead right, his second entry was made without authority of law.

Your office decision holding said entry for cancellation is accordingly affirmed.

HOMESTEAD CONTEST—APPLICATION TO ENTER—PRELIMINARY AFFIDAVIT.

CLEAVES *v.* SMITH.

The rule that preliminary affidavits should not be executed while the land is under appropriation, will not affect an entry of land opened to disposition on the adjustment of a railroad grant, where the affidavit was made before such opening, when in fact the land had been restored to the public domain under the provisions of the forfeiture act of September 29, 1890, prior to the execution of said affidavit.

A preliminary affidavit executed before a United States commissioner outside of the county in which the land is situated is irregular, and a new affidavit should be required; but the irregularity is not a sufficient basis for a contest.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896. (F. W. C.)

I have considered the appeal of Charles A. Cleaves from your office decision of June 20, 1893, sustaining the action of the local officers and dismissing his contest filed against the homestead entry of Murray Smith, covering the NW. $\frac{1}{4}$, Sec. 7, T. 46 N., R. 9 W., Ashland land district, Wisconsin.

This land is within the indemnity limits of the grant for the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha railway, under the grant made by the act of 1856, and is within the primary limits of the grant made by the act of May 5, 1864, for the Wisconsin Central railroad.

At the time of the adjustment of the Omaha grant it was the ruling of this Department that the reservation for the Omaha railroad under the act of 1856 was sufficient to defeat the grant for the Central company, and this tract, with others, was opened to entry under order from this Department on November 2, 1891, as a part of the surplus lands reserved to satisfy the Omaha grant.

Under the decision of the supreme court in the case of Wisconsin Central *v.* Forsyth (156 U. S., 46), said reservation did not serve to defeat the grant for the Central company, but as the said Central railroad company failed to construct its road opposite this land, it was restored to entry under the terms of the general forfeiture act of September 29, 1890 (26 Stat., 496).

As before stated, however, this land was opened to entry on November 2, 1891, as a part of the Omaha surplus lands, and on the morning of that day Murray Smith's homestead application was received by mail and permitted to go of record.

On the 21st of December following, Cleaves tendered a homestead application for this land and in his affidavit alleged that he settled on the land applied for immediately after midnight of the night of November 1, 1891, and began making improvements thereon.

January 24, 1892, the local officers ordered a hearing for the purpose of determining the question of priority of settlement, and upon the day

set for hearing, namely, July 11, 1892, Cleaves filed an affidavit of contest in which he alleged in addition to his claim of settlement, that he was informed and believed that Smith was born outside of the United States and that the entry by Smith was made for speculative purposes. He also moved for the cancellation of Smith's entry for the reason that the homestead affidavit was executed in the county of Douglas and not in the county of Bayfield, in which the land is situated. The last mentioned motion was overruled and after several continuances, the case proceeded to hearing on December 5, 1892, and upon the record made the local officers recommended that Smith's entry remain intact and that the application to contest by Cleaves be dismissed.

In his appeal to your office Cleaves, in addition to the objections made to Smith's entry at the time of the trial before the local office, urged that the same was invalid because the preliminary affidavit was executed at a time when the land was not subject to entry. Your office decision upon his appeal, as before stated, sustained the recommendation of the local officers permitting the entry by Smith to remain intact and dismissing Cleaves' contest from which action he has appealed to this Department.

While it is true that in his appeal he re-alleged his specification of errors set forth in his appeal from the recommendation of the register and receiver, yet it would seem that he has abandoned his claim of prior settlement and seeks to avoid Smith's entry upon the objections heretofore recited.

Upon the question of prior settlement, however, I might state that the record shows that Smith settled upon this land in May, 1891, having purchased certain improvements made thereon by a prior settler; that he repaired the improvements and during the summer of 1891, completed a house and partly built a stable, and has since, to the date of hearing, continued his claim to the land.

As this tract was not a part of the surplus Omaha lands but was, in fact, restored by operation of the act of September 29, 1890, as a part of the unearned Wisconsin Central grant, Smith's acts of settlement performed prior to November 2, 1891, can be considered, and upon the record made there can be no question but he has shown his superior right.

It but remains to consider whether the objections urged to his entry are sufficient to avoid his prior claim gained by reason of his settlement.

It is first urged that he is not a citizen of the United States, but the showing made in support of said charge is not sufficient to overcome that made by Smith, and upon the record I sustain the finding of both your office and the local office as to his qualification. The charge of speculation is wholly unsupported.

His homestead affidavit was executed October 30, 1891, before W. M. Tompkins, United States commissioner, at Brule, Douglas county, Wis-

consin. As these lands were not a part of the Omaha surplus, but were restored to entry under the forfeiture act of September 29, 1890, *supra*, the charge that the affidavit was executed before the lands were open to entry must fail.

The only remaining charge is, that it was executed out of the county in which the land is situated. This your office holds to be immaterial, for the reason that it was executed within the land district.

In the case of Hoge Wilson (20 L. D., 482), it was held that under the provisions of the act of May 26, 1890 (26 Stat., 121), the preliminary papers might be executed before a United States circuit court commissioner within the county in which the land is situated, and an affidavit executed out of the county was held to have been irregular, and your office decision requiring that the party submit a new affidavit was sustained.

This objection is, therefore, well founded, and the question arises whether the defect is sufficient to avoid the entry in the presence of this contest. From a consideration of the matter I am clearly of the opinion that it is not. The fact is patent upon the face of the paper and should have been noticed by the local officers, or the entry suspended when it reached your office and a new affidavit required. While it is an irregularity and a new affidavit should be required, yet I do not think it is sufficient upon which to base a contest.

At the time of trial of this case, Smith tendered a new affidavit made before the register, and I am therefore of the opinion that his right under said entry is complete, and sustain your office decision dismissing Cleaves' contest.

HOMESTEAD—COMMUTATION—ACT OF MARCH 3, 1891.

EUSEBIUS M. MILES.

A homestead entry made after the passage of the act of March 3, 1891, though based on a soldier's declaratory statement filed prior to said act, can not be commuted without fourteen months' residence and cultivation from date of the entry.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896. (C. J. G.)

The above case is in relation to the SE. $\frac{1}{4}$ of Sec. 11, T. 47 N., R. 9 W., Ashland land district, Wisconsin.

This land was formerly included in a grant to a railroad company, and was forfeited by act of Congress approved September 29, 1890. It became subject to entry February 23, 1891. On the latter date Eusebius M. Miles filed his soldier's declaratory statement for said land.

On June 26, 1891, Miles made homestead entry for the land in question, and on November 21, 1891, made commutation proof thereon and cash certificate was issued.

By letter of December 30, 1892, your office directed the local office to call upon claimant to furnish supplemental proof without republication, showing fourteen months residence and cultivation subsequent to June 26, 1891, the date of entry, in accordance with section 6 of the act of March 3, 1891.

Upon the failure of claimant to furnish the supplemental proof requested, your office on June 13, 1894, directed the local office to require him to show cause within sixty days from receipt of notice why his entry should not be canceled.

For reply to said requirement the local office transmitted a statement filed by the claimant wherein it is alleged—

That said commuted cash entry should be patented under the proof submitted November 21, 1891, for the reason that said proof showed full compliance with the law for a period of more than six months prior thereto, and that he initiated his right to make said homestead entry February 23, 1891, by filing on said land his soldier's declaratory statement, said homestead entry being made in accordance with said soldier's declaratory statement, and within six months after date of said filing. His rights thereunder relate back to the date of said filing, and the law under which said filing was made required only six months residence from the date of settlement before the making of commuted proof.

Notwithstanding this allegation your office, on March 26, 1895, held that residence and cultivation for the period of fourteen months from date of entry, June 26, 1891, were imperative, and claimant's cash entry was held for cancellation pending compliance with the law.

Claimant has appealed to this Department.

Section 6 of the act of March 3, 1891, amending section 2301 of the Revised Statutes, reads as follows:

Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months.

From this it is seen that no exceptions are made, but that "*any* person who shall *hereafter* avail himself of the benefits of section 2289," may commute his homestead entry to a cash entry, provided he can make proof of settlement, residence and cultivation for a period of fourteen months from date of entry.

In the case of Francis A. Lockwood (16 L. D., 285) it was held that—

The terms "so entered" and "such entry" in the section taken and accepted in their ordinary sense, as used in the statutes and employed in the land department, can only mean the recorded claim of the settler made upon due application and payment of the requisite fees, and it is from the date of this "entry" that the period of residence must now be computed if "settlement" is not accepted as the equivalent of such "entry."

The only difference between the case at bar and numerous others that have been decided, notably, Francis A. Lockwood (*supra*); Eames v. Bourke (18 L. D., 150); Mathew Benson (18 L. D., 437); Herbert H.

Augusta (19 L. D., 114); Howard G. Robbins (21 L. D., 115), where the same principle was involved, is as to whether the fact that Miles filed his soldier's declaratory statement prior to the act of March 3, 1891, gives him a privilege superior to that of an actual settler, and thereby excepts him from the operation of section 6 of said act. In the cases above cited the question involved was as to whether settlement prior to the act of March 3, 1891, would serve to except the settler from the operation of section 6 of said act where entry was not made until after its passage. In every one of those cases the question was decided in the negative. In the cases of Francis A. Lockwood and Herbert H. Augusta the entries were finally allowed to stand, but that was only because the entryman had sold the lands and on that account the fourteen months residence was impossible.

The filing of a declaratory statement gives the soldier an additional privilege over the ordinary homesteader only in the matter of giving him power to hold his claim for six months after selection. Also, a soldier's claim may be filed by an agent. Outside of these additional privileges he must "fulfill all the requirements of law."

As previously shown Miles "availed himself of the benefits" of section 2289 of the Revised Statutes when he applied on June 26, 1891, to make homestead entry of the land in question. This was subsequently to the act of March 3, 1891. Therefore, his commutation, made November 21, 1891, can be made only under the act in force when he made his entry.

Your office decision is therefore affirmed, and unless the claimant shall furnish the supplemental proof as required his entry will be canceled.

SETTLEMENT RIGHT—RELINQUISHMENT—SECOND ENTRY.

NEWBANKS *v.* THOMPSON.

A party who settles on land covered by the entry of another, under an agreement with the prior entryman that such entry shall be relinquished for his benefit, acquires no right as a settler as against the intervening entry of another, made on the relinquishment of the prior entry, if he fails to secure the release of said land, through contest, or in the manner agreed upon.

The right to make a second homestead entry under section 2, act of March 2, 1889, can not be invoked for the protection of a settler who at the time of his settlement has an entry of record for another tract.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 24, 1896. (J. A.)

The land involved herein is the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21, T. 2 N., R. 27 W., Chamberlain, South Dakota, land district.

May 7, 1892, Robert S. Carlin made homestead entry for said tract.

The entry was canceled on relinquishment April 14, 1894, and on the same day Charles F. Thompson made homestead entry for the land.

May 22, 1894, Noah Newbanks filed an affidavit of contest against said entry alleging that he settled on the land November 15, 1893, after having a short time prior thereto, with the consent of Robert Carlin whose entry was of record until April 14, 1894, made valuable improvements on the land; that his improvements are worth \$1,000.00; that at the time of making said improvements Carlin promised and agreed that he would relinquish his entry so that the affiant could make entry; that Thompson is not a settler on the land and has no improvements thereon, and that he knew at the time of his entry, April 14, 1894, that the affiant was living on the land with his family.

On the day set for hearing, August 20, 1894, the entryman moved the dismissal of the contest on the ground that the affidavit of contest does not state a cause of action. The local officers denied the motion. On the same day the contestant presented homestead application for the land, making the following statement in his homestead affidavit accompanying the application:

I have not heretofore made any entry under the homestead laws, except that in August or September, 1888, at the U. S. land office at Deadwood, Dakota Territory I made entry for a tract of land in Custer county, Dakota Territory; that I made settlement thereon in August or September 1888, and built a house and corrals thereon to the value of \$500.00 but that I abandoned said tract in October, 1891, on account of drouth and failure of crops; (and) that I am unable to describe the land.

Hearing was had before the local officers September 25, 1894. October 10, 1894, they rendered decision recommending the cancellation of the entry. On the entryman's appeal your office, on February 15, 1895, affirmed the decision of the local officers holding that under section 2 of the act of March 2, 1888 (25 Stat., 854), the contestant is entitled to make homestead entry for the land, having failed to perfect title to the land entered by him in 1888. Your office found in regard to Newbanks' settlement on the tract in question that about June 1, 1892, he made an agreement with Carlin by the terms of which Carlin was to relinquish the land for a consideration of \$25.00; and that shortly after entering into said agreement Newbanks settled on the land. In reference to Newbanks' former entry the decision states that the records of your office show that the same was contested September 21, 1894, on the charge of abandonment, and canceled February 11, 1895, Newbanks failing to make any defense.

Thompson's appeal from said decision brings the case before me for consideration.

According to the statement made in his affidavit of contest Newbanks had been living on the land for five months under the agreement that Carlin was to relinquish his entry. Your office found that he had been living on the land for about two years under that agreement.

While Newbanks bases his claim of prior right on his settlement he also, in effect, takes the position that the land was segregated from the

public domain for his benefit by Carlin's entry. The agreement of Carlin was of such a nature that his entry would have been canceled on proof thereof in a contest proceeding. Had Thompson contested the entry and proved the agreement between Carlin and Newbanks the preference right could have been awarded him over Newbanks by reason of having cleared the record.

Newbanks, by his failure to contest Carlin's entry, or to procure the filing of his relinquishment, did not only subject himself to the rights of anyone who might choose to contest Carlin's entry, but also forfeited his rights as against Thompson, who made entry after the filing of Carlin's relinquishment. Newbanks is in the same position as a suitor in a court of equity—he must show equitable action on his part. The fact that he had resided upon and cultivated the land and made valuable improvements is not a sufficient showing of equity. In view of his agreement with Carlin it was his duty upon his settlement, to clear the record of Carlin's entry. Instead of taking steps in that direction he had, according to his statement in his contest affidavit, resided on the land for five months at the date of Carlin's relinquishment and Thompson's entry. He then attacked Thompson's entry, in effect claiming that Carlin's entry segregated the land from the public domain for his benefit. He cannot be allowed to take such an inequitable stand. His affidavit of contest is insufficient.

The Department has held in the following cases that the right of a settler who is residing upon land covered by the entry of another attaches *eo instanti* on the relinquishment and cancellation of such entry, and is superior to that of a homesteader who makes entry for the land immediately after its relinquishment: *Wiley v. Raymond*, 6 L. D., 246; *Zaspell v. Nolan*, 13 L. D., 148; *Stone v. Cowles*, 13 L. D., 192; *Fosgate v. Bell*, 14 L. D., 439; *McGowan v. McCann*, 15 L. D., 542; *Blauvelt v. Masden*, 18 L. D., 538; *Rickers v. Tisher*, 19 L. D., 421; *Dowman v. Moss*, 19 L. D., 526. Those cases differ from the case at bar in that none of the settlers lived on the land with the entryman's consent, and none of them could be required to clear the record of the existing entry. They were given the preference right of entry over the intervening entrymen because under the circumstances under which their settlements were made the equities were in their favor. The circumstances are different in the case at bar. Newbanks' equities by reason of his settlement are more than offset by his action in allowing the land to remain segregated by an entry which by reason of his own agreement with the entryman was subject to contest. It was incumbent on him on Carlin's failure to relinquish immediately after entering into the agreement, to contest the entry, charging the fact of the agreement and alleging his settlement.

As the affidavit of contest was insufficient the defendant's motion to dismiss the contest should have been sustained.

There is another reason calling for the dismissal of the contest.

Section 2 of the act of March 2, 1889 (25 Stat., 854), under which your office held that Newbanks acquired a settlement right to the land in question, provides as follows:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry for not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated.

It was not intended by said act to allow an entryman while his entry is of record to lay claim to another tract under the settlement laws. The fact that Newbanks had abandoned the land covered by his entry gives him no standing as a settler on the tract in question for the reason that his entry segregated the land covered by it from the public domain. He can not by an entry for one tract and a settlement on another segregate both from the public domain. Neither can Carlin's entry segregate the land for his benefit. Nor can his improvements give him any right to the land although, as found by your office, they are valuable and were made under the belief that he had the right to enter the land. While the decision appealed from is on the question of Newbanks' right to make a second entry, within the letter of the act of March 2, 1889, it was contrary to the spirit of the homestead law to recognize him as a settler on the tract in question while his entry was of record. He had the right after February 11, 1895, the date of the cancellation of his entry, to make a second entry. That fact, however, would not inure to his benefit in the case at bar, if his claim to the land were otherwise valid, for the reason that the case must be governed by the facts as they stood April 14, 1894, the date of Thompson's entry.

The decision appealed from is reversed.

RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

SOUTHERN PACIFIC R. R. Co. *v.* MCKINLEY.

The fact that there is a deficiency in a railroad grant does not relieve the company from the necessity of specifying losses in support of indemnity selections.

A list of indemnity selections, in which no losses are designated as bases for the selections, is no bar to a subsequent adverse appropriation of the lands embraced therein; and a list of such character can not be perfected by the specification of losses after the intervention of adverse claims.

The right of a railroad company to take a tract of land as indemnity must be determined by the status of such tract at the date of the application to select the same.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896.
(W. C. P.)

I have considered the case of the Southern Pacific Railroad Company *v.* Walter A. McKinley on the appeal of the former from your office decision of March 16, 1895, holding for cancellation its applica-

tion to select as indemnity the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 25 S., R. 30 E., M. D. M., Visalia, California, land district, and directing the allowance of McKinley's application to make homestead entry of said land.

The decision appealed from sets forth the facts as shown by the records of your office, substantially, as given below.

The land in controversy is within the indemnity limits of the grant to said company by the act of July 26, 1866 (14 Stat., 292) and on September 15, 1885, the company applied to select these tracts as indemnity. The local officers refused to approve said list (No. 22), because no bases for selection had been designated, from which action the company appealed to your office. On November 12, 1885, one Joseph P. Morrison was allowed to make homestead entry for said lands. On December 9, 1885, while the appeal from the rejection of the first list was pending in your office, the company presented another list of selections (No. 23) embracing the same tracts and designating losses. This list was also rejected by the local officers on the ground that the company had not complied with the regulations governing in such cases. On January 10, 1895, said list (No. 23) was returned to the local officers, with instructions to re-examine the same without regard to the objections theretofore made by them, and to require new lists to be submitted, one showing the tracts they could approve, and the other the ones they could not approve. The tracts in question are included in the list (No. 56), approved by the local officers on May 10, 1892.

In the meantime Morrison's homestead entry was canceled by the local officers, the reason therefor not being shown in the record now before me, and on the same day, December 13, 1887, one Jeff. D. Hampton made homestead entry for these lands. This entry was on August 28, 1891, canceled as the result of a contest prosecuted by McKinley, and he was given thirty days within which to exercise his rights as a successful contestant. The following statement was made in this notice to him, dated September 3, 1891:

Before said land can be entered by you or any other person it must be shown to have been not subject to selection by said company.

It seems that McKinley attempted to exercise his rights, for on September 12, 1891, he filed a formal application to make homestead entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and at the same time presented his formal application, asking to be allowed to contest the claim of the company to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section. The local officers seem to have regarded these papers as constituting an application to make entry for both tracts, because the register in transmitting the papers to your office uses this language:

Herewith I transmit the papers in homestead application of Walter A. McKinley for E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 35, T. 25 S., R. 30 E., M. D. M., presented in this office and rejected September 12, 1891, for the reason stated on the application of said McKinley to contest the claim of the S. P. R. R. Co. to said land, attached to said homestead application.

The reason given for the rejection was that it was not sufficiently shown that the land was not subject to selection by the company.

It is claimed in behalf of the company that because of the fact that there is a deficiency in its grants it was unnecessary to designate lost lands for which indemnity was asked, and that therefore its selection of September 15, 1885, was a valid one. This contention cannot be sustained. All the decisions of this Department are against it, and I find no good reason for changing the rule. The case cited in support of this argument (*New Orleans Pacific R. R. Co.*, 20 L. D., 162) is not pertinent since the question is one entirely different from the one presented here. That decision simply held that because of the deficiency the company might be excused from designating losses for previously patented lands, but does not intimate that it would be released from such designation with respect to selections not patented prior to the issuance of the regulation of August 4, 1885, requiring the same.

The indemnity withdrawal made for the benefit of the grant in question was in violation of the law and is no bar to the acquisition of settlement rights. (*Stuart v. Southern Pac. R. R. Co.* (22 L. D., 61).

The indemnity list presented by the company September 15, 1885, designated no losses as bases for the selection and hence was no bar to a subsequent appropriation of the lands, and the list may not be perfected by the designation of losses after the intervention of an adverse claim. *Hoelt v. St. Paul & Duluth R. R. Co.* (15 L. D., 101); *Oregon and California R. R. Co. v. Small* (19 L. D., 422).

The company's claim in this case must be held to date from December 9, 1885, the time the second list was presented. At that time the land was covered by an adverse claim, and hence the company's selection could not be properly allowed then.

The only question left to be determined is as to whether the company's claim attached at once upon the cancellation of Morrison's entry as against the entry of Hampton made the same day. It has been held in many cases that the right of a railroad company to take any tract of land as indemnity must be determined by the status of such tract at the date of the application to select the same. *Northern Pacific R. R. Co. v. Loomis et al.* (21 L. D., 395), and authorities there cited.

In the case of *Alabama and Chattanooga R. R. Co.* (20 L. D., 403), a selection which could not properly have been allowed at the time made, because of a prior adverse claim, was approved after such claim was relinquished. But this case does not antagonize the general rule, because this action was taken in view of the fact that the land was free and subject to selection at the date of the decision. It was thought unnecessary under these circumstances to require the company to go through the formality of presenting a new selection.

It is clear that your decision, holding the company's selection of the land in question for cancellation is fully justified by the authorities cited above, and the same is hereby affirmed.

MINING CLAIM—MILL SITE—INDEPENDENT APPLICATION.

ECLIPSE MILL SITE.

Under the first clause of section 2337, R. S., the owner of a patented lode may by an independent application secure a mill site, if good faith is manifest, the improvements sufficient, and no adverse claim exists.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 24, 1896. (P. J. C.)

The record before me shows that the Eclipse Mining Company, by C. H. Abbott, agent, located the Eclipse mill-site, in Monarch mining district, Chaffee county, Colorado, Leadville land district, April 15, 1882. In the certificate of location no reference whatever is made by which it could be determined that the mill-site was located in connection with any mining claim. On April 17, 1883, application for patent was filed for the mill-site, survey No. 3118. In the field notes of the official survey no improvements were reported, but it was said by the deputy-surveyor: "The above-described mill-site is located in connection with the Eclipse lode." Subsequently, however, on December 15, 1883, the surveyor-general certified that \$500 worth of improvements had been placed on the mill-site, consisting of a frame office sixteen by twenty seven feet, and two log cabins eighteen by twenty feet each. Final entry was made February 11, 1884.

On January 7, 1887, your office considered this entry, and it was determined that it was not shown that there was a quartz mill or reduction works on the mill-site, nor any labor or improvements thereon, nor that it was used for mining or milling purposes; that the application was based on the fact that the Eclipse Mining Company was the owner of and working the Eclipse mine; that the Eclipse mine had been patented April 18, 1884, and no reference was made to any mill-site in connection therewith. The entry was, therefore, held for cancellation.

On February 26, 1887, the affidavit of Abbott was filed, by which it was shown that on the mill-site the Eclipse Company had "an office building, assay office, store-room, and other structures."

By your office letter of March 19, 1887, it was decided that the certificate of the surveyor-general showed \$500 worth of improvements, but affirmed the former decision in other respects.

Thus the matter seems to have rested until October 20, 1894, when your office called for a report as to what action had been taken by the applicant, as required by your office letter of March 19, 1887. The corroborated affidavit of Abbott was then forwarded, by which it is shown that there is an eight-room house, used as an office and residence for the superintendent of the Eclipse mine; a stable for four horses; a railroad switch that will hold ten railroad cars, and a small building for storage purposes, all used in connection with the Eclipse mine and cost over \$1500.

Your office by letter of February 20, 1895, again considered the matter, and affirmed the former judgment. A motion for review was filed and overruled, April 11, 1895, whereupon the applicant prosecutes this appeal.

Section 2337 of the Revised Statutes, permitting entry of mill-sites, reads as follows:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

It will be seen that this section provides for two classes of claims to be entered. The first is non-adjacent surface-ground, used or occupied by the proprietor of a "vein or lode for mining or milling purposes." The ruling of your office is that under the first clause the application for the mill-site must be made with that of the lode; in other words, they must be simultaneous and patented together. The second class is distinctly defined, and what is contemplated thereby can not be misunderstood. It is as clearly distinguished from the first as words can possibly make it.

The question presented here is, whether the owner of a lode for which patent is issued may, by an independent application, secure patent for a mill-site.

I think it may be conceded that it is shown here by affidavits that the applicant has in good faith improved, and used, the mill-site in connection with the mine; that is, the buildings erected thereon are used and occupied as a residence and office by the superintendent; the stable for the horses used in connection with the mine; the product thereof is stored on the mill-site, and a railroad switch is maintained thereon for use in the transportation of the ores. In view of this showing, it may be safely assumed that, in contemplation of the statute, the mill-site is used for "mining" purposes.

The exact question presented here has been before the Department but twice, so far as my research has extended. The first case is that of Charles Lennig (5 L. D., 190). The applicant in that case attempted to procure a patent for the Eureka mill-site. Mr. Secretary Lamar, after quoting section 2337, defined his conception thereof in the following language:

The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site." They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a

lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz-mill or reduction-works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be *using* it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

This entry was not allowed, for the reason that the "facts show plainly that the land is not used or occupied for the purpose for which it was located, or for any purpose in connection with mining or milling."

The next case is that of Cypress Mill site (6 L. D., 706), where the language used in the Lennig case is adopted. This application was also rejected, but for the reason that it was shown that it was sought to get the land for the water thereon only, and was not to be used in connection with mining or milling. It was said in that case, however, it is not intended to rule that in no case can an owner of a vein or lode claim make entry of a mill-site under said section (2337), unless the claim for the same shall be embraced in the application for a vein or lode.

It would seem from this express declaration that the question involved herein was under consideration in that case, and the Department refused, or at least declined, to decide it adversely.

It will thus be seen that while the Department has refused two applications for a mill-site patent independent of the lode claim, it has been upon other grounds than that the applications were not made as one, and the reasoning in the Lennig case, together with the announcement in the Cypress Mill-site case, as quoted above, point irresistibly to the fact that for this reason alone they would not have been rejected.

The matter of improvements on mill-sites has been before the Department. In Gold Springs and Denver City Mill-Site (13 L. D., 175), which was an application for patent for a lode and mill-site, your office held that "building tanks, a spring house, and a stone cabin," were insufficient improvements to warrant issuance of patent. This judgment was reversed by the Department, and it was held that

lasting improvements have been made on the land embraced in the mill-site, indicating good faith. There is more than the mere use of water—the mill-site is improved and used, as above seen, in connection with the mine.

Again, in Satisfaction Extension Mill-Site (14 L. D., 173), it was said:

As it appears that the applicant owns two houses on said mill-site occupied by his employees for purposes in connection with said mill, he uses the land for mining

or milling purposes within the meaning of the statute as above construed. The erection of dwelling houses on the mill-site is clearly a very substantial use and improvement of the land. They become a part of the realty, and would pass by a conveyance of the real estate, and when such houses are erected for workmen employed in connection with the mill, the land is used for milling purposes.

These citations are sufficient to indicate that the improvements on the Eclipse Mill-site are ample to bring it within contemplation of the statute.

As applied to the case at bar, where good faith is manifest, the improvements sufficient, and there are no adverse rights, it seems to me that this section should not be given a mandatory interpretation. The statute reads that the "surface-ground *may* be embraced and included in an application for a patent for such vein or lode, and the same *may* be patented therewith." This language is purely directory, or permissive.

In this case the owner of the Eclipse lode did not locate his mill-site until after his application for a patent for the lode claim. It seems to me that it comes equally within the spirit of the statute if the mill-site be located after the lode claim is patented. As said by Mr. Secretary Lamar, in the Lennig case, "the manifest intention of Congress was to grant an additional tract to a person" for use in connection with the lode. It is not difficult to conceive how exploration and development after patent of the lode claim might make it absolutely necessary to have additional surface-ground for the economical and practical working of the lode, and where there is good faith apparent there can be no objection, in my judgment, in permitting the entry.

Your judgment is, therefore, reversed, and the Eclipse mill-site entry will be passed to patent.

MILLE LAC INDIAN LANDS—ACT OF JANUARY 14, 1889.

PETER DHALIN.

The Mille Lac Indian lands are not subject to disposal under the general homestead law, but under the special provisions of the act of January 14, 1889.

Secretary Smith to the Commissioner of the General Land Office, April 24, 1896. (W. A. E.)

On October 15, 1894, Peter Dhalin filed his application to enter under the general homestead law the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 24, T. 42 N., R. 26 W., St. Cloud, Minnesota, land district.

This application was rejected by the local officers for the reason that the tract lies within the so-called Mille Lac Indian reservation and is not subject to disposal as provided by the act of Congress, approved January 14, 1889 (25 Stat., 642).

On appeal your office by letter of December 17, 1894, affirmed the action of the register and receiver, whereupon Dhalin filed further appeal to the Department.

The act of July 4, 1884 (23 Stat., 89), provided that the lands included in the former Mille Lac Indian reservation should not be patented or disposed of in any manner until further legislation by Congress. The only further legislation since that time that could be held to apply to the Mille Lac lands is (with the exception of the special act of December 19, 1893, confirming certain entries,) the act of January 14, 1889. If that act does not apply to the Mille Lac lands—if it be held that said lands were not at the date of the passage of said act a “reservation” within the plain meaning and intent of Congress—then the suspension created by the act of July 4, 1884, is still in force, and those lands are not now subject to disposition under any law. If that act does apply to the Mille Lac lands and relieve the suspension, then the special provisions of said act in regard to method of disposition also apply. In either case said lands are not now subject to entry under the general land laws.

In the case of *Amanda J. Walters et al.* (12 L. D., 52), the Department held in regard to the Mille Lac lands that the “further legislation” required by the act of July 4, 1884, prior to the disposition of the lands named therein, is provided by the act of January 14, 1889. Subsequently, in the case of the Northern Pacific Railroad Company *v.* Walters (13 L. D., 230), and the instructions of April 22, 1892 (14 L. D., 497), it was definitely determined that the lands formerly occupied by the Mille Lac Indians are not subject to disposition under the general land laws, but under the special provisions of the act of January 14, 1889. This ruling has since been indirectly confirmed by Congress in the passage of the act of December 19, 1893 (28 Stat., 576), to relieve certain entrymen who had made entry for portions of the Mille Lac lands under a former ruling of the Department that those lands were subject to entry under the general land laws.

Your office decision is hereby affirmed.

MILLE LAC INDIAN LANDS—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

PATRICK FOX.

An entry of Mille Lac Indian lands made under the general land laws, and prior to July 4, 1884, is protected under the proviso to section 6, act of January 14, 1889, with a view to its final disposition under the laws in force at the time of its allowance, and it therefore follows that such an entry does not fall within the general order of May 3, 1892, suspending entries of Mille Lac lands for which there was no statutory protection, and that such order will not defeat confirmation of said entry under section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 28, 1896. (W. A. E.)

The tract involved in the present case, viz: the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 42 N., R. 27 W., St. Cloud (for-

merly Taylor's Falls), Minnesota, land district, is a portion of what is known as the Mille Lac Indian reservation.

On September 20, 1894, your office held for cancellation, on the report of special agent F. W. Worden, the cash entry of Patrick Fox, commuted March 17, 1891, from homestead entry No. 3334, made March 17, 1884, for the above described tract, and directed the local officers to call upon Fox to show cause within sixty days why his entry should be held intact.

Fox appealed, and your office, on February 2, 1895, held that the action of September 20, 1894, was interlocutory and appeal did not lie therefrom.

Fox thereupon made application under rules 83 and 84 of practice to have the record certified here. The application was granted by the Department on May 18, 1895 (20 L. D., 468), and your office was directed to send up all the papers connected with the case. In compliance with said order, the record was transmitted here on May 31, 1895.

In order to a clear understanding of the case, a brief preliminary account of the Mille Lac Indian lands will be necessary.

The Mille Lac Indians are a band of the Chippewas, and the "Mille Lac Indian reservation" in Minnesota was created by treaty concluded February 22, 1855 (10 Stat., 1165). The lands embraced in said reservation were set apart by said treaty as a permanent home for the Mille Lac Indians, but subsequently, by treaties of March 11, 1863 (12 Stat., 1249), and May 7, 1864 (13 Stat., 695), this reservation and others established by the treaty of 1855 were ceded to the United States, other lands being reserved for said Indians in lieu of those ceded.

In both the treaty of March 11, 1863, and the subsequent treaty of May 7, 1864, it was provided:

That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

The question then arose as to whether this proviso excluded said lands from sale and disposal by the United States. Secretary Chandler held, in the case of Frank W. Folsom (decided March 1, 1877, but not reported), that it did not, but Secretary Schurz took a different view of the matter, and by letter of May 19, 1879, directed the cancellation of entries for these lands, which had been allowed in large numbers under the decision in the Folsom case.

Subsequently, Secretary Teller, by letter of May 10, 1882, stated that he felt "constrained to substantially adhere to the decision made by Secretary Chandler in the Folsom case," and on August 7, 1882, directed the reinstatement of the entries canceled by order of Secretary Schurz. Many of these entries were reinstated and new entries were allowed, among the latter being the entry involved in the present case, that of Patrick Fox, made March 17, 1884.

March 21, 1884, Congress called on this Department for a report as to the status of the Mille Lac lands, and in view of the condition of affairs disclosed, provided by the act of July 4, 1884 (23 Stat., 89), that said lands "shall not be patented or disposed of in any manner until further legislation by Congress."

By this act Congress did not undertake to annul or set aside entries made on said lands or divest rights (if any) acquired therein, but only directed that the *status quo* be maintained until further legislation. (David H. Robbins, 10 L. D., 3.)

On January 14, 1889, Congress passed "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota" (25 Stat., 642). The first section of said act authorizes and directs the President to appoint three Commissioners,

whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake reservations.

Provision is then made in subsequent sections for the survey of the ceded lands, their division into "pine" and "agricultural" lands, and the manner of their disposal. Section 6, in regard to agricultural lands, directs that

the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

No specific mention is made in this act of the Mille Lac Indians and the lands occupied by them, which, as was stated above, were ceded to the United States in 1863. However, the Mille Lacs were treated with under said act and they formally relinquished any and all right of occupancy that they possessed upon the lands inhabited by them and removed to the White Earth reservation.

In the case of *Amanda J. Walters et al.* (12 L. D., 52), decided by the Department on January 9, 1891, it was held (syllabus), that

the "further legislation" required by the act of July 4, 1884, prior to the disposition of the lands named therein, is provided by the act of January 14, 1889, and such legislation is now operative, as the cession of the Indians' right of occupancy has been obtained, and received the approval of the President.

It was also held in said case,

that the land in question was not a reservation within the meaning of the act. It was ceded in 1863, it had been declared open to entry by successive decisions from the Department under the regulations of the Land Office, and was the very land referred to and intended to be covered by the proviso to section 6.

Your office being in doubt, in view of the decision in the Walters case, as to whether the Mille Lac lands were to be disposed of under the provisions of the act of January 14, 1889, or as other public lands under the general laws, asked for instructions, and on January 21, 1891, was advised by the Department that the Mille Lac lands should be disposed of as other public lands under the general laws.

Following this ruling of the Department, a number of entries were allowed for the Mille Lac lands under the general homestead and pre-emption laws.

On September 3, 1891, the question as to the status of the Mille Lac lands again came before the Department in the case of the Northern Pacific Railroad Company *v.* Walters (13 L. D., 230), and it was then held that said lands were to be disposed of under the special provisions of the act of January 14, 1889.

In reply to your office letter of March 12, 1892, calling attention to departmental letter of January 21, 1891, and the entries allowed in accordance therewith, you were informed by letter of April 22, 1892 (14 L. D., 497), that the decision of September 3, 1891, in the above cited case, being the later expression of the Department, must prevail, and that the lands formerly occupied by the Mille Lac Indians are not subject to disposition under the general land laws, but under the special provisions of the act of January 14, 1889.

In view, however, of the hardship that would have resulted had the entries made subsequent to the decision in the Walters case, under the general laws, been canceled outright, or payment for the land demanded from the entrymen under the act of January 14, 1889; your office issued a general order on May 3, 1892, suspending those entries, and the matter was referred to Congress.

On December 19, 1893, Congress passed an act for the relief of those parties who had been misled by the decision in the Walters case and the instructions of January 21, 1891. This act (28 Stat., 576), reads as follows:

That all bona fide pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation in the State of Minnesota between the ninth day of January, eighteen hundred and ninety one, the date of the decision of the Secretary of the Interior holding that the lands within said reservation were subject to disposal as other public lands under the general land laws, and the date of the receipt at the district land office at Taylor's Falls, in that State, of the letter from the Commissioner of the General Land Office, communicating to them the decision of the Secretary of the Interior of April twenty second, eighteen hundred and ninety two, in which it was definitely determined that said lands were not so subject to disposal, but could only be disposed of according to the provisions of the special act of January fourteenth, eighteen hundred and eighty nine (twenty five

Statutes, six hundred and forty two), be, and the same are hereby confirmed where regular in other respects, and patent shall issue to the claimants for the land embraced therein, as in other cases, on a satisfactory showing of a bona fide compliance on their part with the requirements of the laws under which said filings and entries were respectively allowed.

It will be seen from the above résumé of the various actions in regard to the Mille Lac lands that there are three classes of entries or filings on those lands; first, entries or filings made prior to July 4, 1884, which are to be proceeded with under the general land laws; second, entries or filings allowed under the general land laws between January 9, 1891, and the date of the receipt at the district land office at Taylor's Falls of the letter from your office communicating to the register or receiver departmental decision of April 22, 1892, which are to be adjudicated with reference to the special act of December 19, 1893; and third, entries allowed under the special provisions of the act of January 14, 1889.

Fox' original entry was made, as has been stated above, on March 17, 1884, under the general homestead law. March 17, 1891, it was commuted to cash, final certificate was issued June 27, 1891, and on January 9, 1892, your office approved said entry for patent.

February 23, 1894, an investigation as to this claim was ordered by your office, and as a result of that investigation the entry was held for cancellation.

It is contended by Fox that as more than two years from date of final certificate had elapsed before proceedings were begun against his entry by your office, said entry was confirmed under the seventh section of the act of March 3, 1891 (26 Stat., 1095).

Your office held, in the decision which it is sought to have reversed, that the general order of suspension from your office on May 3, 1892, was such a "proceeding" against said entry as excepted it from the confirmatory provisions of the act of March 3, 1891.

It seems to me that the error made by your office was in considering Fox' entry as on the same footing with original entries made under the general land laws subsequent to January 9, 1891, the date of the decision in the Walters case.

Fox' cash entry is based on his homestead entry, which was made March 17, 1884, under the general homestead law. The act of January 14, 1889, expressly provides that "any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance."

The right to commute after a certain period of residence and cultivation is one enjoyed by the general homesteader and that right was not taken away from Fox by the act above referred to. On the contrary, it was inferentially confirmed. He was strictly within his right, therefore, when he commuted his entry to cash on March 17, 1891.

The general order of suspension from your office on May 3, 1892, and the act of December 19, 1893, were intended to affect, and did affect,

only the second class of entries for the Mille Lac lands, viz., original entries allowed under the general land laws between January 9, 1891, and the date of the receipt at the district land office of the letter from your office communicating departmental decision of April 22, 1892. Those entries were made under a mistaken construction of law and had to be referred to Congress for conditional confirmation.

Fox' cash entry stood on an entirely different footing. It was made under authority of law, and did not need to be referred to Congress for confirmation. It was not affected or covered by the order of May 3, 1892, from your office, and the act of December 19, 1893.

It follows that there was no proceeding against said entry by your office until February 23, 1894, when an investigation was ordered. At that time more than two years from date of final receipt and certificate had elapsed.

It must accordingly be held that said entry had become confirmed under the proviso to the seventh section of the act of March 3, 1891.

Your office decision is reversed, and the entry will be passed to patent.

OKLAHOMA TOWN LOTS—SETTLEMENT RIGHTS.

AVERY ET AL. *v.* FREEMAN ET AL.

An inconspicuous stake neither on a corner nor line of a town lot is not such evidence of settlement and appropriation thereof as to defeat a subsequent settlement right acquired without actual notice of the prior settlement claim.

While it is lawful to issue a joint deed to a town lot for the protection of separate interests such recognition should not be accorded an adverse occupant whose possession is secured through fraud and violence.

The survey of a townsite and approval of the plat effectually divests all prior settlement rights asserted by lot claimants to land that may be included in streets and alleys, and no authority exists in the trustees to deed land thus dedicated to the public use.

Secretary Smith to the Commissioner of the General Land Office, April (J. I. H.) 28, 1896. (C. J. W.)

This case came here on appeal from your office decision and was considered on June 12, 1895, and your office decision with slight modification was approved. Avery and Meyers have moved for review of said departmental decision, and as counsel both for and against the motion have been heard, the motion will be considered without the usual order that it be entertained.

The motion presents two well defined objections to the decision complained of, one of these objections presenting a question of fact to be settled by reference to the record, and the other a question of law. The question of fact is as to the time at which the parties performed acts of settlement on lot 12, as now surveyed. I find on examination

of the decision of the townsite board, that while there was a majority and minority report, so far as they refer to the time of Avery's settlement, they agree upon the general proposition that he arrived at Guthrie not later than 1.25 o'clock P. M., and that he went without delay to the open ground upon which he staked out his claim. They do not undertake to state the precise time of the arrival of Freeman and Carter.

In reference to the time of their arrival they say:

From the testimony it is clear that claimants Freeman and Carter were each upon the ground early in the afternoon of April 22, 1889, and that their location was earlier than any other claimant unless the action of Avery hereinafter to be more particularly specified constituted some claim to lot 12, the lot in controversy.

This seems to indicate that the board was of opinion that Avery was upon some part of the land embraced in his claim at an earlier moment than Freeman's arrival on lot 12. In your office decision of April 17, 1894, there is no specific finding as to the time of arrival of the different parties on the day of the opening. In the decision under review the Department found that Freeman arrived by train at 2 o'clock and went immediately to the west half of lot 12 and staked it, and that Carter reached there about 3 o'clock and staked the east half of the same lot. There is no specific finding as to the hour of Avery's arrival on his claim, but in the body of the opinion it is said,—“The proof clearly shows that Freeman and Carter were the first occupants of lot 12; that they made valuable improvements on it and maintained their occupancy.”

I have examined the voluminous record of evidence, and am of opinion that Avery reached some part of the claim staked by him as early as ten minutes before 2 o'clock, and that he was somewhere on his claim in advance of Freeman's arrival on lot 12. While some of the witnesses testify that Avery's tent was erected on lot 12, I think the preponderance of the evidence shows that either it was never on lot 12, or if so, was moved off in a short time. Meyers, his co-claimant, testifies (pages 42 to 43 of record), that Avery's tent was partly in the street and partly on lot 13. That before the survey it was entirely in the street. The only act of settlement by Avery on lot 12, made on the day of the opening, which is shown with any clearness was the driving of one stake on this lot, which was intended to indicate the northeast corner of his staked claim. The business house of Avery and Meyers, located on the southwest corner of lot 12, was erected somewhere from the 10th to 14th of May. They have occupied it from that time and still occupy it. Since that time they have cut off and occupy about forty feet of the south end of said lot including said building. It is apparent that, unless the driving of said stake on lot 12 immediately after his arrival on the 22d is held to be an act of settlement, sufficient to give notice that he was claiming that lot, Avery could not be held to have settled or occupied it before Freeman and Carter, who placed thereon

plain and visible marks of improvement and settlement on the afternoon of the 22d.

I am clearly of opinion that this inconspicuous stake, neither on a corner nor line of the lot was not such evidence of settlement and appropriation, as to defeat the settlement of Freeman and Carter, who had no actual notice that Avery claimed it, and that upon their occupancy of part of the lot, their rights became paramount as to the whole lot, subject only to the qualification that they should improve it, and continue their occupancy to the time of its entry for townsite purposes. The townsite entry which embraces this lot was made August 2, 1890. It is to be noted that at this date Avery and Meyers were actual occupants of the south forty feet of said lot, and unless such occupancy is in fraud of the rights of Carter and Freeman, they are entitled to that part of the lot so actually occupied by them, and in that event, Carter, Freeman, Avery and Meyers would be entitled to a joint deed for the whole lot, in which their respective interest should be described. While it was held in the case of McGrath *et al.*, 20 L. D., 543, that,—the execution of deeds to fractional parts of surveyed and numbered lots is not authorized,—it does not follow that there can be no recognition of the interests of more than one occupant of the same lot. Sec. 2387, Revised Statutes, provides—

That whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and if not incorporated for the judge of the county court for the county in which said land is situated to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the *several use and benefit* of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

Under the provisions of the act of May 14, 1890, (26 Stat., 109), providing for townsite entries of lands in Oklahoma, it is provided that the entries may be made by the trustees to be appointed by the Secretary of the Interior, the entry to be made as near as may be under the provisions of Sec. 2387, *supra*, and that after such entry, the Secretary of the Interior shall provide regulations for the proper execution of the trust by such trustees. Under this authority to provide regulations for the execution of the trust, it is lawful to provide that the title to such surveyed lot shall pass by one deed, but not in such way as to defeat the interest of an actual *bona fide* occupant at the date of the entry, where there is more than one such occupant of the lot, but in such case the deed should be joint, to the several occupants. Where more than one occupant is upon the same lot at the date of the entry, they are not to be treated as joint occupants if the occupancy of any one or more of them is shown to be the result of fraud or force as against the rights of a *bona fide* occupant of the same. It becomes

necessary to inquire whether or not Avery and Meyers, who were actual occupants of lot 12, with Freeman and Carter, at the date of the townsite entry, were such occupants by permission of Freeman and Carter, or occupants in their own right under such circumstances as will estop Freeman and Carter from asserting their rights of prior settlement, so as to include in their claim that part of the lot covered by the improvements of Avery and Meyers. Starting with the proposition that Carter and Freeman were settlers upon lot 12 on the day of the opening and in advance of either of the other parties, it follows that the visible acts of settlement performed by them upon a part of the lot operated as notice of their claim to the whole lot, and was sufficient to shut it off from rightful occupancy by another. The evidence shows that they claimed the whole lot, and that Carter as soon as he could get lumber laid a platform or foundation for a building on the end of the lot now occupied by Meyers and Avery, but that the same was stolen and privately removed without his knowledge. The fence built by Avery cutting off part of the lot was built privately in the night time; the erection of the shoe store on the corner of the lot in May was in the face of actual notice of the claim of the other parties. While it is difficult to account for the quiet manner in which Freeman and Carter submitted to these acts of trespass upon the lot, and the mildness of their protest against it, I am of opinion from the whole testimony that the acts of Avery and Meyers so far as they relate to occupancy of lot 12, partake of the nature of both force and fraud, and that their occupancy does not under the circumstances defeat the right of Freeman and Carter to the whole lot. This would be sufficient to justify the rejection of their application for a deed to the part of lot 12 claimed by them.

The question of law presented by the motion for review remains to be considered. The application of Avery and Meyers for a deed embraces fractions of different town lots, and part of a street and alley, and ignores the survey and platting of the town into lots, streets and alley. The application is for the tract as staked and marked by them at the time of settlement, and their insistence is, that their settlement rights attached to the whole tract as staked, without reference to the subsequent platting, and that a visible act of settlement upon any part of it, even in a street, would extend to the whole tract.

The right to settle upon the public domain for several distinct purposes is recognized. Such rights depend to some extent upon the purpose for which the settlement is made. It is perfectly apparent that Avery and Meyers did not make their settlement for ordinary homestead purposes, but for business purposes to be carried on in a prospective town. The proposition insisted upon by the movants was passed upon by the supreme court of Oklahoma, in the case of the City of Guthrie v. Beamer, in an action brought by Beamer against the board of townsite trustees and the City of Guthrie to compel a conveyance to

him by said trustees of a parcel of ground embraced within the town-site of Guthrie and located on a portion of the tract laid out and used for a public street in said city. The supreme court, in passing upon said case, say:

The right of Congress to dispose of the public lands is a power granted by the constitution and every person who initiates a claim to a portion of the public domain takes such right subject to this power of Congress; and such power of disposal continues until the United States has estopped herself to divest such right by accepting something of value from the claimant and permitting an entry of the land at the proper land office. When the Secretary of the Interior or the trustees appointed by him, under his instructions, adopted and approved the plat of the town site of Guthrie, which the inhabitants had made long prior to the entry of the land by the trustees, the lands designated as public streets on such plat, were dedicated to the public use; and the act of Congress and the action of the Secretary under the power vested in him by said act, had the effect to divest any individual interest that might have been asserted to such portion of said land, and Beamer has no rights or interest in the public streets, which can be conveyed to him, by the trustees. (Pac. Rep., Vol. 41, p. 647).

The power of Congress to dispose of the public domain being a constitutional power, one who merely settled upon it of his own motion, without proceeding through the proper land office does not thereby acquire any vested right which will estop Congress from dedicating any part of it to public use, as for a street in a town, but such right is subordinate to this power of dedication from its inception and is taken subject to it. The case of the *Kansas Pac. R. R. Co. v. Dunmeyer* (113 U. S., 629), presents strongly the rights of settlers, but it is therein decided that they do not attach to the land so as to bind the law making power, except by a proceeding through the proper land office, that is by a formal entry allowed.

The act of Congress of May 14, 1890, empowered the Secretary of the Interior to prescribe the rules and regulations for the survey of lands occupied for townsite purposes into lots, blocks and alleys, or through the trustees to adopt any survey and plat which had previously been made by the inhabitants of the townsites. In this instance a survey and plat, made by the inhabitants of Guthrie prior to the passage of the act of May 14, 1890, was after the passage of said act adopted and approved by the Secretary of the Interior, and after its adoption and approval, any right which Avery and Meyers, or either of them, may have had by reason of their settlement made before the survey to any part of a street or alley was divested. That the trustees have no power to deed a lot before the tract has been surveyed and platted into lots, blocks, streets and alleys, and that they have no power to deed any part of streets or alleys after such survey, was decided in the case of *McGrath et al.*, 20 L. D., 543, before quoted.

No reason is presented which requires that the rule therein announced shall be changed, and the decision under review is accordingly reaffirmed.

SCHOOL GRANT—LANDS OF KNOWN MINERAL CHARACTER.

FREES ET AL. *v.* THE STATE OF COLORADO.

Outcropping surface veins of coal on a school section are not sufficient, in the absence of evidence as to the actual value of the deposit, to establish the known mineral character of the land, and except it from the operation of the school grant.

Secretary Smith to the Commissioner of the General Land Office, April 28, 1896. (P. J. C.)

It is not deemed necessary for a decision of the issue in this contest to recapitulate all the record history of the tract involved in this controversy. Suffice it to say that Benjamin M. Frees and three other persons filed application to purchase as coal land Sec. 36, T. 31 S., R. 65 W., Pueblo, Colorado, land district, July 28, 1891. The local office refused this application because the land had been declared to belong to the State as school land. On appeal your office reversed this action, and the Department, by decision of July 7, 1893 (L. & R., 269, p. 365), denied an application for certiorari on behalf of the State and thus affirmed your office judgment, ordering a hearing to determine the question as to whether the tract in controversy "was of known mineral character prior to and at the date of the admission of the State to the Union."

A hearing was accordingly had before the local officers, and as a result they found that the contestants had failed to prove their claim that the section "was known mineral land Aug. 1, 1876."

On appeal your office by letter of February 14, 1895, affirmed the judgment below. Whereupon the mineral claimants prosecute this appeal.

From an examination of the voluminous record I fully concur in the judgments below.

It may be added that it is not at all certain from the testimony whether any coal was known to exist on Sec. 36 prior to August 1, 1876, the date of the admission of Colorado to the Union. But if all the testimony given in behalf of the mineral claimants be accepted as giving the actual condition prior to that date, then it is wholly insufficient to establish the mineral character of the land. The most that can possibly be said for it is that there were two or three insignificant openings on some surface coal; the excavations being sufficient for demonstrating whether the land could be known as mineral in character. If it be conceded that any coal was hauled from the section during that period, it consisted of but a few wagons loads taken from outcropping surface veins, which is insufficient to establish the existence of known mines. There is no attempt made to show that mines, as such, had been opened capable of producing coal or which would characterize the section as mineral.

In *Colorado Coal Company v. United States* (123 U. S., 307) the supreme court, on page 328, say:

It is not sufficient, in our opinion, to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent and of greater or less value, as shown by outcroppings. The act of 1864 evidently contemplates a distinction between coal beds or coal fields excluded from the pre-emption act of 1841 as "known mines," and other coal beds or coal fields not coming within that description. We hold, therefore, that to constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the vein as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale.

It is true the court in that case discussed the question of known mines as used in the pre-emption law, but the same rule would apply to this case where the land passed to the State for school purposes under grant by the government at the date of its admission.

Your judgment is therefore affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN.

MAKEMSON *v.* SNIDER'S HEIRS.

The failure of a homesteader in his lifetime to establish residence on the land, due time having elapsed therefor prior to his death, and the subsequent failure of his heirs to reside thereon, require the cancellation of the entry.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 28, 1896. (C. W. P.)

I have considered the case of *Thomas Makemson v. the heirs of Barton Snider*, deceased, involving the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 21, township 22 S., range 24 E., Topeka land district, Kansas.

On October 11, 1889, Barton Snider made homestead entry of said land.

On September 29, 1894, Thomas Makemson filed amended affidavit of contest, alleging that

Barton Snider died about January, 1893, and left surviving him as his only heirs, Alen Snider, his son, William Snider, his son, John Snider, his son, Rebecca Stone, his daughter, and Irene Marlet, his daughter, all of legal age; that no administrator has ever been appointed for the estate of the said Barton Snider; that said Barton Snider and none of his heirs or representatives have ever resided on said lands since

making said entry; that said tract is not settled upon by said party as required by law; that said Barton Snider and his heirs aforesaid have never erected any buildings on said lands.

A hearing was had before the local officers, at which the contestant appeared and submitted proof. The defendants made default.

Upon the testimony on the part of the contestant, the register and receivers, on December 6, 1894, rendered their decision that the homestead entry of Barton Snider should be canceled.

From this decision no appeal was taken by the defendants, but when the case came before your office for consideration, your office reversed the judgment of the local officers under Rule 48 of Practice, stating, in your office decision, that the decision of the local officers, "although final as to the facts, as provided by Rule 48 of Practice, does not warrant a cancellation of the entry."

The contestant has appealed to the Department.

The record shows that Barton Snider made homestead entry October 11, 1889; and the register and receiver found: that he died about the month of December, 1892; that he never resided on the land in question as a homestead, and after his death none of his heirs or legal representatives resided on said land as a homestead; that it was rented out, and that no one resided thereon; that the land was used more as an adjoining or separate tract and no pretense of its being a homestead was ever made; that in this respect the homestead laws have been wholly disregarded, and, in their opinion, the lands were never taken for a homestead.

The heirs of a deceased homestead entryman, who has complied with the law up to the date of his death, by continued cultivation of the land, for the remainder of the prescribed term of five years, may complete the claim and receive patent for the land. They are not required to reside upon the land. *Tauer v. The Heirs of Walter A. Mann*, 4 L. D., 433; *Agnew v. Morton*, 13 L. D., 228.

In *Swanson v. Wisely's Heir*, 9 L. D., 31, the entry was made March 7, 1883, and the entryman died August 26, 1883, less than six months after the entry was made. It was not shown that he ever settled upon the land, but, as the law allowed the entryman six months from the date of entry to establish residence, and as the testimony failed to show that the land was abandoned by the entryman's heir, but on the contrary the testimony showed that he had continued to cultivate the land, upon a contest charging abandonment and failure to maintain residence on the part of the entryman and his heir, the decision of the Commissioner dismissing the contest was affirmed.

In the case of *Stewart v. Jacobs*, 1 L. D., 636, the entry was made March 24, 1874, and the entryman died June 25, 1874, without having entered upon or cultivated the land. The contest, initiated in November, 1877, was held not good in so far as it related to the failure of the entryman to establish residence upon the land prior to his death, which occurred before six months had expired after entry; but was sustained

on account of the failure of the heirs of Jacobs to keep up a continuous cultivation of the land after the expiration of the six months.

In *Reid v. Heirs of Plummer*, 12 L. D., 562, the contest was based upon the charge that Plummer in his lifetime never established a residence upon the land, and that his heirs have never resided upon, cultivated or improved the land.

Plummer made entry September 29, 1885,

The testimony showed that neither the entryman, who was killed May 12, 1886, nor his heirs, ever established or maintained residence upon the land. But it was shown that Plummer intended to reside upon the land, but was prevented from doing so by an armed mob, and finally murdered. It was held that, under such circumstances, his failure to establish or maintain residence on the land was excusable; that his son was not required to reside upon the land after his father's death, and that his failure to cultivate the land was due to the same cause which prevented his father from establishing residence upon the land, and that it would be manifestly unjust to hold the entry for cancellation for want of such cultivation.

In *Brown v. Naylor*, 14 L. D., 141, it was held that a contest against the entry of a deceased homesteader, charging abandonment on the part of the entryman and his heirs, must fail, where it appeared that the entryman died prior to the expiration of six months from the date of entry, and the heirs subsequently comply with the law in the matter of cultivation. See also the recent case of *Ware v. Wright*, 22 L. D., 181.

Clearly the facts found by the local officers sustain the charge in the contest affidavit, that Snider in his lifetime never resided upon the land, and after his death none of his heirs ever resided thereon, and the cases I have cited all proceed upon the ground that failure to establish and maintain residence on the part of a deceased entryman, in his lifetime, unless he dies before the expiration of the period allowed by the law for the establishment of residence, is good cause for canceling the entry, when the entry is contested, after the entryman's death, on the ground of the entryman's failure to establish and maintain residence upon the land.

The decision of your office is, therefore, reversed, and the entry of Barton Snider will be canceled.

HOMESTEAD—FINAL PROOF—NON-RESIDENT HEIR.

LAWSON ET AL. *v.* WADDELL'S HEIRS.

A final homestead affidavit submitted by a non-resident heir is entitled to equitable consideration where executed outside of the district and State in which the land is situated, and it appears that the affiant, on account of extreme age and ill health, is physically unable to appear before an officer authorized by statute to act in such cases.

Secretary Smith to the Commissioner of the General Land Office, April 28, 1896. (I. D.)

William B. Waddell in his life time made homestead entry for the E. $\frac{1}{2}$, SE. $\frac{1}{4}$ Sec. 33, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 34, T. 43 N., R. 9 W., Montrose land district, Colorado, alleging settlement May 1, 1884.

He lived on the land, cultivating it and made improvements until March 23, 1890, when he was found dead in his house on the land.

He was a single man, and his heirs are a brother Benjamin N. Waddell and a sister, Mrs. Elizabeth N. Weaver, both living in Indiana.

In October, 1890, Benjamin N. Waddell wrote to an attorney in the county where the land lies, to complete the entry and see to settling up any property of his deceased brother.

On January 20, 1891 the intervenor, Savignac, went to Indiana and paid Benjamin N. Waddell \$250, for a quit claim deed for his interest in the land, and early in March 1891 moved upon the land, and began to improve it.

Lawson settled on the land May 5, 1891 knowing of Savignac's claim and settlement.

Both Savignac and Lawson have continued to live there and improve the land, except for a time the former left, taking part of his furniture and lived on rented land, but that absence seems to have been because of frequent interference with him by Lawson, and trouble between them, but such absence was temporary only and in no sense an abandonment of his settlement or claim to the land.

March 27, 1891, Lawson applied to enter the land, which application was refused because of conflict with the Waddell entry, whereupon he initiated a contest against the entry charging that the heirs had abandoned the land, and afterward May 4, 1894 he filed a supplemental affidavit charging in addition to abandonment that the heirs were holding the land for speculative purposes, and that Savignac had abandoned the land for more than a year.

Savignac meantime had been permitted to intervene and filed his affidavit of contest, claiming settlement March 5, 1891, and also claiming to have bought the improvements from one of the heirs.

Two hearings were had, and at the second hearing under instructions from this Department (*Lawson v. Heirs of William B. Waddell*, February 12, 1894) final proof was offered by Mrs. Weaver.

The evidence shows that the entryman had complied with the law and was entitled to make his final proof before his death.

The final proof was accepted by the local officers, who also found that the heirs had not abandoned the entry, and recommended the dismissal of both contests and the acceptance of the final proof.

Your office sustains the findings of the local officers except "that the affidavit required by Sec. 2291, Rev. Stat., has not been submitted" and action on final proof was suspended to give opportunity for such affidavit.

Since this appeal has been perfected, such affidavit was made by Mrs. Weaver in due form and is now on file in the case, but it was sworn to before a notary public in the State of Indiana, and does not comply with the provisions of the act of May 26, 1890—(26 Stat., 121), requiring such proof to be made within the district where the land is situated.

The reason given for this is that Mrs. Weaver is seventy-two years old and can only walk with the aid of crutches and is physically unable to go to Colorado. The land having been fully earned by compliance with the law by the entryman during his life time, the condition of the heir seems to call for the exercise of equitable power, and the case is therefore returned for consideration with a view to accepting her final proof affidavit. Nancy J. Crews (14 L. D., 687), William H. Bowman (7 L. D., 18), Rebecca C. Williams (6 L. D., 710).

RAILROAD GRANT—SCHOOL INDEMNITY SELECTION—APPEAL.

SIoux CITY AND PACIFIC R. R. Co. v. WRICH.

A school indemnity selection made prior to statutory authority therefor does not reserve the land covered thereby from the operation of a railroad grant.

The Secretary of the Interior is charged with the adjustment of railroad grants, and should withhold from other disposition lands granted for such purpose, even though the grantee may fail to appeal from an erroneous adverse decision of the General Land Office.

Secretary Smith to the Commissioner of the General Land Office, April 28, 1896. (F. W. C.)

I have considered the appeal by the Sioux City and Pacific railroad company, from your office decision of March 4, 1895, dismissing its protest against the issue of patent upon the cash entry of Carsten Wrich, made September 25, 1893, under the provisions of section 5, of the act of March 3, 1887 (24 Stat., 556), covering the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 21, T. 17 N., R. 11 E., Neligh land district, Nebraska.

This land is within the common limits of the grants made to aid in the construction of the Union Pacific and Sioux City and Pacific railroads.

At the dates of the attachment of rights under said grants the land in question was, so far as the record before me shows, free from adverse

claim otherwise than the school indemnity selection made July 1, 1858, which selection was canceled July 3, 1880, there having been no statutory authority for the making of said selection prior to February 26, 1859.

This tract has been listed by the Union Pacific railway company, and by your office decision of November 24, 1891, said listing was held for cancellation and the claim of the Sioux City and Pacific railroad company was rejected.

Neither company appealed, and on May 19, 1892, the listing by the Union Pacific was canceled.

On September 25, 1893, Wrich, having purchased this tract of the Union Pacific railway company, was permitted to make cash entry of the land under the provisions of section 5 of the act of March 3, 1887, *supra*.

The Sioux City and Pacific railroad company protested against the issue of patent upon said entry, urging that the land was not subject thereto but had passed under the grants to the Union Pacific and Sioux City and Pacific railroads.

This protest was overruled in your office decision of March 4, 1895, from which the company presented an appeal, but the same was refused because filed out of time.

A petition of certiorari was then filed, which was considered in departmental decision of October 18, 1895 (not reported) and granted and the record ordered to be certified to this Department.

In accordance with said order the record is now before me.

The showing made by the company in support of its petition is fully sustained by the record, and in view of the decision in the case of *Union Pacific Ry. Co. v. United States* (17 L. D., 43), wherein it was held that (syllabus)—

A school indemnity selection, made prior to statutory authority therefor, does not reserve the land so selected from the operation of a railroad grant on definite location of the road,

it is apparent that your office erred in holding the tract in question to have been excepted from these grants.

In the case of *Knight v. United States* (142 U. S., 181), it was held that—

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

While it is true that the companies failed to appeal from your office decision adverse to their claimed rights under their grants, yet as the land is still within the jurisdiction of this Department I am of the

opinion that as the matter has been brought to my attention, the regularity of the proceeding is not material, and as I am charged under the laws with the adjustment of these grants, that I am bound to withhold from other disposition lands falling within the terms of the grants.

I have therefore to direct that Wrich's entry be canceled, unless, after due notice other and sufficient reason is given for holding this land to be excepted from these grants than the fact that it was covered by the indemnity State selection.

Your office decision is therefore reversed.

HOMESTEAD ENTRY—CONFLICTING SETTLEMENT RIGHTS.

IRWIN v. NEWSON.

If the parties can not agree to a division of the land, in a case wherein the priority of settlement can not be determined by the evidence, the land should not be divided between them by a departmental order, but the right of entry to the entire tract awarded to the highest bidder of the two.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 28, 1896. (C. W. P.)

I have considered the case of John W. Irwin against Charles H. Newson upon their cross appeals from the decision of your office of May 15, 1895.

The land in controversy is the NW. $\frac{1}{4}$ of section 34, T. 23 N., R. 2 W., Perry land district, Oklahoma.

On September 16, 1893, the day on which the land was opened to settlement, these parties made settlement on said land.

On September 25, 1893, Newson made homestead entry, No. 748, of said land.

On October 25, 1893, John W. Irwin filed affidavit of contest, alleging prior settlement.

A hearing was had; the local officers recommended the cancellation of Newson's entry, and that Irwin be allowed to make homestead entry of the land. Newson appealed.

Your office rendered a decision to the effect, that you were unable to determine who was the prior settler, and thought the case should be settled between the parties, and that each of them should make entry of such legal subdivisions of the land as they may agree upon, and your office reversed the judgment of the local officers, and ordered that, in case of the failure of the parties to compromise, as above suggested, within sixty days, that Newson's entry be canceled as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section, and the right of entry for the east half be awarded to Irwin.

I agree with your office that the evidence is so conflicting that it is impossible to decide which of the two claimants was the prior settler;

but I cannot agree with that part of your office decision which directs, that, in case of failure of the parties to agree to a compromise the land be divided between them. I think that in such a case as this, if the parties cannot agree, the land should be sold to the highest bidder of the two. (See *Hopkins v. Wagner et al.*, 21 L. D., 485).

The decision of your office is modified accordingly. The papers are herewith returned.

EXTENSION OF TIME FOR PAYMENT—RAILROAD LANDS.

WILLIAM HENRY.

An extension of time for payment may be granted under the remedial provisions of the act of July 26, 1894, to a purchaser under the second clause of section 3, act of September 29, 1890.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 28, 1896. (C. J. G.)

The land involved in this case is the S. $\frac{1}{2}$ of lots 10, 11 and 12, Sec. 31, T. 19 S., R. 14 E., Visalia land district, California.

On October 17, 1894, William Henry appeared with his witnesses at the local office and offered final proof on his application to purchase said land under section 3 of the act of September 29, 1890 (26 Stat., 496).

The testimony in said proof shows that claimant made settlement on this land in November, 1887, and was therefore an actual resident thereon at the time of the act above mentioned.

When claimant's proof had been submitted, as appears from the report of the local office, he stated that he had no money with which to make payment for the land. No further arrangements were made at that time, nor did claimant apply for an extension of time within which to make payment.

Claimant was notified twice, on November 10, 1894, and on December 3, 1894, to come forward and make payment. On the latter date he was informed that unless he made payment within ten days his proof would be rejected.

On December 28, 1894, the local office rejected claimant's proof because "no payment or tender of payment has been made by claimant for said land."

On January 24, 1895, claimant appealed to your office from the rejection of his proof, the basis of said appeal being that under the provisions of the act of July 26, 1894 (28 Stat., 123), he is entitled to one year from the date of proof within which to make payment for the land in question.

Claimant accompanied his appeal to your office by an application for an extension of time within which to make payment, invoking therein the provisions of the act of July 26, 1894.

By your office decision of March 20, 1895, you affirmed the action of

the local office in rejecting claimant's proof, holding that the provisions of the act of July 26, 1894, were not applicable to entries under the act of September 29, 1890; that said act extends the time for making final proof and payment on existing entries only under the desert land, homestead and pre-emption laws.

In his appeal to this Department claimant states that

the reason of his application (for an extension of time) was that his crops failed, that he had to rely upon the proceeds of his crops from which to obtain means to enable him to pay for said land; that the year 1894 was a dry year in the State of California, and a year of disappointments and failures, and that crops were an entire failure on and in the vicinity of the land involved, and that he did not realize anything from his labors, and that he was without means with which to pay for the land.

By a joint resolution of Congress of September 30, 1890 (26 Stat., 684), it was enacted—

That whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

The act of Congress approved July 26, 1894, cited by claimant, provides:

That the time of making final proof and payment for all land located under the homestead and desert land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby extended for the period of one year from the time proof and payment would become due under existing law.

The acts above cited are remedial in their nature and were passed for the benefit of settlers on the public lands who, by reason of a failure of crops for which they are in no wise responsible, are unable to make the payments on their homestead claims.

The land in question was included in the grant to the Southern Pacific Railroad Company, and was forfeited by the act of September 29, 1890. There are two classes of persons referred to in the third section of said act, viz: 1. Persons who "are in possession" of such lands, "under deed, written contract with, or license from, the state or corporation to which such grant was made, or its assignees;" 2. persons who "may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation." The claimant in the case at bar comes under the second class.

Prior to the act of Congress approved January 23, 1896, it was held that applicants of the second class mentioned in section 3 of the act of September 29, 1890, must show the same good faith in the matter of settlement and residence as those who make homestead applications under the general laws. *Brown v. Hinkle* (15 L. D., 168); *James C. Daly* (17 L. D., 498); *Same*, on review (18 L. D., 571); *O'Leary v. Smith* (17 L. D., 542); *Shafer v. Butler* (19 L. D., 486). This being true there

seems to be no good reason why the remedial benefits of the act of July 26, 1894, should not extend to this class of entrymen under the act of September 29, 1890.

There is nothing in the act of July 26, 1894, directly excluding this class of entrymen from the benefits of said act; on the contrary the remedial provision being directed to "*all land located under the homestead laws of the United States*" would seem to include just such entrymen. As previously shown the same requirements are imposed upon this class of entrymen as upon those who enter under the general laws. The only difference seems to be in the manner of obtaining title.

There seems to be no question that claimant has been guilty of negligence, so far as neglect to take some action when notified by the local office is concerned. His explanations are not entirely satisfactory, but among them he claims ignorance of the law. One James K. Rhoads made homestead application for the land in question on November 24, 1894. But notwithstanding this adverse application and claimant's seeming negligence, I am disposed to award him the benefit of the act of July 26, 1894, in view of the fact that he has shown good faith in other respects.

The testimony shows that claimant has valuable improvements on this land and has about twenty acres under cultivation.

Your office decision is accordingly reversed, claimant's proof will be accepted and he will be allowed to make payment of the fees and purchase money, unless some other objection shall appear.

ARID LANDS—SETTLEMENT RIGHTS.

SJUNE BONDESON.

The act of October 2, 1888, providing for the withdrawal of arid lands did not contemplate the impairment of rights acquired prior to its passage through bona fide settlement and occupancy, and it therefore follows that a pre-emption settlement and filing made prior to the date of said act may be carried to entry and patent subsequently thereto.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 28, 1896. (J. L.)

This case involves lots 1 and 2 of section 24, T. 15 S., R. 43 E., containing 52.30 acres of land in Blackfoot land district, Idaho. It comes before this Department upon the appeal of Sjune Bondeson from your office decision of January 9, 1891, which is in the following words:

JANUARY 9, 1891.

REGISTER AND RECEIVER, *Blackfoot, Idaho.*

GENTLEMEN: By letter "E" of July 8, 1890, pursuant to the order of the Hon. Secretary of the Interior, township 15 S., range 43 E., with other lands were reserved for the site of a reservoir. Under the act of August 30, 1890, this reservation took effect October 2, 1888.

Pre-emption cash entry of Sjune Bondenson, No. 816, for lots 1, and 2, section 24, made November 20, 1889, subsequent to such reservation is therefore illegal, the land not being subject to entry. Said entry is therefore held for cancellation as illegal. See case of Henry Bolton of this date. So advise Sjune Bondenson, allowing him 60 days for appeal.

Respectfully,

W. M. STONE,
Assistant Commissioner.

The "letter 'E' of July 8, 1890," referred to in said decision cannot be found in your office. There is found however a letter "E" of August 5, 1889, which is in the following words:

AUGUST 5, 1889.

REGISTER AND RECEIVER, *U. S. Land Office, Blackfoot, Idaho.*

GENTLEMEN: Enclosed herewith is a copy of a letter, dated July 19, 1889, from J. W. Powell, Director of the U. S. Geological Survey, addressed to the Secretary of the Interior, reporting that the site of Bear Lake, located mainly in Bear Lake county, Idaho, had been selected as a reservoir site, together with all lands situated within two statute miles of the borders of said lake at high water.

The Director recommends that all public lands within the described limits be withdrawn from entry and settlement.

Under date of July 26th last the Secretary of the Interior directed this office to instruct you not to allow further entries or filings on the lands named in said letter.

In compliance with departmental directions you are hereby instructed to comply with the recommendation of the Director of the U. S. Geological Survey, as approved by the Secretary of the Interior, said recommendation to be effective on and after July 19th last.

Please acknowledge receipt.

Very respectfully,

(Signed) W. M. STONE,
Acting Commissioner.

It is shown by the record before me that Sjune Bondeson filed his pre-emption declaratory statement No. 246, for the 52.30 acres of land aforesaid, on March 28, 1888, alleging settlement on March 24, 1888. On November 18, 1889, after due publication, Bondeson made his final proof and payment, and procured final certificate for said lots No. 816, dated November 20, 1889.

It was proved, and it is not questioned, that Bondeson made his settlement on March 24, 1888, and began to build his improvements, which consist of a dwelling house, stable, stock yard and corral, fencing and irrigating ditch, valued at \$500 or \$600; that on March 1, 1889, he moved his family, consisting of a wife and five children upon the premises, and has ever since maintained thereon continuous residence and cultivation; and that he has equipped his farm with agricultural implements, household and kitchen furniture, five horses, fifteen head of cattle, ten sheep, pigs and chickens, cats and dogs, and other domestic comforts of a thrifty farmer. These two lots according to the official map lie on the west shore of Bear Lake, and are therefore within the limits of the reservation for a reservoir site made by the letter of August 5, 1889 above quoted.

Seven months after Bondeson made his settlement, to wit: on October 2, 1888 (25 Statutes 527), Congress enacted as follows:

And all the land which may hereafter be designated or selected by such United

States (Geological) surveys for sites for reservoirs, ditches or canals for irrigation purposes; and all lands made susceptible of irrigation by such reservoirs, ditches or canals, are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

This act does not seem to affect Bondeson's settlement and occupation prior to its passage.

The first Land Office circular under this act was issued August 5, 1889, and was published in 9 L. D., 282. It instructed the local officers as follows:

You will therefore immediately cancel all filings made since October 2, 1888, on such sites for reservoirs, ditches or canals for irrigating purposes, and all lands that may be susceptible of irrigation by such reservoirs, ditches or canals, whether made by individuals or corporations, and you will hereafter receive no filings upon any such lands.

This did not affect Bondeson's filing which was made before October 2, 1888. As stated above, on November 18, 1889, he made his final proof and consummated his pre-emption cash entry.

By the act of August 30, 1890 (26 Statutes, 391), Congress repealed so much of the act of October 2, 1888 aforesaid, as withdrew from settlement and occupation "all lands made susceptible of irrigation by such reservoirs, ditches or canals;" but re-enacted:

That reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement, *as provided by said act*, until otherwise provided by law; and reservoir sites *hereafter* located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

This act plainly implies that the reservations for reservoir sites made prior to the act were to take effect as of October 2, 1888; and that Congress knowing the construction which the Department had placed upon the former act, intended to ratify and confirm it.

By section 17 of the act of March 3, 1891, Congress enacted—

That reservoir sites located or selected, and to be located and selected under the provisions of the (act of October 2, 1888, 25 Statutes, 527), and the amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands *occupied by actual settlers* at the date of the location of said reservoirs.

Bondeson, as an actual settler, was occupying the land in controversy at the date of the location of the Bear Lake reservoir in July 1889. His land would therefore be excluded from the site of said reservoir by the act aforesaid, "so far as practicable."

But Bondeson's rights as a preemptor in March 1888, and as a cash entryman in November, 1889, antedate said act. Congress did not intend by the act of October 2, 1888, to impair the rights which had accrued prior to its passage, by reason of bona fide settlement and occupancy. "Shall not be subject after the passage of this act to entry, settlement or occupation" are the words of the statute; and they plainly imply a recognition of the rights incident to occupation, settlement or

entry prior to the passage of the act. Such was the contemporaneous construction of the Land Department.

The case of Emilio Torres (17 L. D., 341), differs from the case now under consideration, in that, Torres made his settlement and filing more than three years after the passage of the act of October 2, 1888; while Bondeson made his settlement and filing seven months before its passage.

For the foregoing reasons your office decision of January 9, 1891, is reversed so far as it affects Bondeson's pre-emption cash entry No. 816 of lots 1 and 2 of section 24, T. 15 S., R. 43 E., containing 52.30 acres; and said entry will be held intact, and be patented.

PRIVATE LAND CLAIMS—SMALL HOLDINGS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1896.

REGISTERS AND RECEIVERS,

*United States Land Offices in the
Territories of New Mexico, Arizona and Utah,
and the States of Colorado, Nevada & Wyoming.*

GENTLEMEN: Referring to the circular of instructions of September 18, 1895 (21 L. D., 157), in relation to claims arising under the sixteenth and seventeenth sections of the act of March 3, 1891 (26 Stats., 854), as amended by the act of February 21, 1893 (27 Stats., 470), you are directed to require the claimant in each of such cases to publish notice of his intention to submit proof of his occupation and possession of the land included in his claim, in accordance with the requirements of said act, under the same terms and restrictions as govern publication of notice in homestead cases.

These instructions only apply to cases wherein proof is hereafter submitted, and will not have a retroactive effect.

The form of notice should follow, as nearly as practicable, that in homestead cases, with the necessary alterations to indicate the character of the claim and of the proof to be submitted.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
JNO. M. REYNOLDS,
Acting Secretary.

PRIVATE LAND CLAIMS—SMALL HOLDINGS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 1, 1896.

REGISTERS AND RECEIVERS,
*United States Land Offices in the
Territories of New Mexico and Arizona, and
the States of Colorado, Utah, Nevada, and Wyoming.*

GENTLEMEN: The circular of March 25, 1896, requiring publication of notice of intention to submit proof on claims arising under the sixteenth and seventeenth sections of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), is so far modified that publication of notice will not be required in cases where the aggregate area claimed is less than forty acres.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

INDIAN LANDS—LEAVE OF ABSENCE—FINAL PROOF.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 7, 1896.

REGISTERS AND RECEIVERS,
*Chamberlain, Huron, Mitchell, Pierre,
Rapid City, and Watertown, South Dakota.*

GENTLEMEN: Your attention is called to the Act of Congress, approved February 26, 1896 (Public—No. 27), which provides—

That all settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation, in the State of South Dakota, during the year eighteen hundred and ninety-five are hereby granted leave of absence from such homestead for one year from and after the date of this act, and that by such absence such homestead settler shall not lose nor forfeit any right whatever: *Provided*, That the settler shall not receive credit upon the period of actual residence required by law for the time he is absent.

Sec. 2. That any such homestead settler may avail himself of the benefits of this act by filing a notice with the local land office describing his land and date of settlement thereon, which notice shall be signed by the settler and attested by the register of the land office.

Sec. 3. That the time for making final proof and payment for all lands located under the homestead laws of the United States upon any lands of any former Indian reservation in the State of South Dakota, be, and the same is hereby, extended for

the period of one year from the time proof and payment would become due under existing laws.

It will be observed that sections 1 and 2 apply only to parties who made homestead settlement in 1895, upon the lands ceded by the Yankton tribe of Sioux Indians which were opened to settlement May 21, 1895, by the President's proclamation of May 16, 1895, issued under the act of August 15, 1894 (28 Stat., 314-819), and which are embraced in the Mitchell land district; that any party availing himself of the privilege conferred by section 1, does so on condition that the time of his actual absence thereunder will not be credited on the period of residence required by law; that the leave of absence granted by said section 1, being for one year from and after the date of the act, a settler may begin his absence at any time during such year by filing the notice as required by section 2, but in no case can any leave of absence under this act extend beyond the expiration of one year from February 26, 1896, the date of the act. Section 2 is not construed by this office to mean that a settler must necessarily appear in person at the district office to sign and file his notice. A notice received by mail or otherwise, may be approved by the register. In every case the register will see that the notice conforms to the requirements of said section 2 as to the description of the land and date of settlement and he will note thereon the date upon which it is filed and make such notes on the records of your office for your future guidance as will indicate the time the settler will be actually absent from his homestead, and thereafter transmit the notice to this office to be filed with the entry papers.

Section 3, referring to all lands of any former Indian reservation in South Dakota, extends the time for making final proof and payment on homestead entries (existing on the date of the approval of the act) for one year from the time such proof and payment would otherwise become due. Under existing law a homestead entryman who can show five years' compliance with the law can make and file his final proof in the proper district office at any time prior to the expiration of seven years from the date of his original entry, or eight years, if his original entry was made on or prior to July 26, 1894 (See act of July 26, 1894, 28 Stat., 123). Therefore final proof and payment for lands referred to by this section, where the entries were made subsequent to July 26, 1894, and before or on February 26, 1896, will not be due until eight years from dates of the respective entries, and not until nine years where the entries were made on or prior to July 26, 1894. Claimants affected by this section will be notified relative to the statutory period and the expiration thereof, according to forms 4-343 and 4-344, properly modified.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

WM. H. SIMS,
Acting Secretary.

TIMBER CULTURE FINAL PROOF—ACT OF MARCH 4, 1896.

S. LIZZIE GUERNSEY.

Under the act of March 4, 1896, the personal evidence of a timber culture entryman, on the submission of final proof, may be taken before a United States court commissioner, or a clerk of any court of record, anywhere in the United States; and the provisions of said act are properly applicable in a case wherein final action has not been taken on the proof submitted.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (C. J. W.)

On June 25, 1884, S. Lizzie Guernsey made timber culture entry No. 5453, for the NW. $\frac{1}{4}$ Sec. 20, T. 112 N., R. 77 W., Pierre, South Dakota. On November 25, 1893, she offered final proof and obtained final certificate No. 225. On November 27, 1894, your office rejected said final proof, for the reason that her final proof, as to her own testimony, was made before George B. Brooks, United States circuit court commissioner for the eastern district of Michigan, and outside said land district, and held her final certificate for cancellation.

She moved in your office for review of said decision, and on March 14, 1895, your office, considering said motion, reaffirmed your former decision.

Guernsey has appealed from your office decision, and the same is now before me.

It is insisted that under section 2294, Revised Statutes of the United States, as amended by act approved May 26, 1890, her proof was properly taken, and it was error to reject it. In the case of Edward Bowker (11 L. D., 361) this section as amended was construed, and it was held that the proof could only be made before the officers named, in the county or district where the land is situated. The construction now contended for is not without great force and reason, but the case above quoted must control.

The act construed in said case embraces affidavits required under the homestead, pre-emption, timber culture and desert land laws. The law as construed therein is still applicable to all affidavits required to be made under homestead, pre-emption and desert land laws, but by a recent act of Congress, approved March 4, 1896, the personal affidavit of a timber culture claimant is taken without this rule, and such affidavits may now be made before the officers in said act named anywhere in the United States. Said act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That timber-culture claimants shall not be required, in making final proof, to appear at the land office to which proof is to be presented, or before an officer designated by the act of May twenty-sixth, eighteen hundred and ninety, within the county in which the land is situated; but such claimant may have his or her personal evidence taken by a United States court commissioner or a clerk of any court of record under such rules and regulations as the Secretary of the Interior may prescribe.

The rejected personal affidavit of Miss Guernsey is one required by the timber culture laws and the regulations thereunder, and is therefore the character of affidavit which by act of Congress above quoted is taken from under the rule in the case of Edward Bowker. It is true when your office rejected said affidavit said act of Congress had not been passed, and your office decision was in accordance with the rule in force, but said decision had reference only to the admissibility of the evidence, and the legal obstacle in the way of its admission having been removed by Congress, before final action on her proof, said affidavit may now be accepted. The only objection to her final proof being the alleged defect in her affidavit, your office decision is reversed; said final proof accepted, and final certificate No. 225, held to be valid and intact.

MINING CLAIM—ADVERSE JUDICIAL PROCEEDINGS.

CLIPPER MINING COMPANY.

A suit pending on an adverse claim operates to oust the Department of all jurisdiction over the matters involved therein, even though the judicial proceedings rest on a claim wherein the application for patent has been denied by the Department.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (P. J. C.)

The record before me shows that the Clipper Mining Company on August 31, 1893, made application for patent for the Capitol, Clipper, Congress and Castle lode claims, lot No. 6965, Leadville, Colorado, land district, and that during the period of publication adverse claims were filed, among them one by A. D. Searl *et al.*, alleging conflict with the Searl placer claim. Suits were instituted, but all were dismissed except the Searl placer. Thereupon the applicant applied to purchase the land claimed. The local officers rejected this application and returned the purchase money for the reason that there was nothing on file to show that the suit of Searl *et al.*, had been finally determined and disposed of.

The applicant appealed, and your office by letter of April 27, 1895, affirmed the action, whereupon this appeal is prosecuted, assigning error as follows:

1. It was error for the Commissioner to hold that M. A. No. 4359, is subject to the Searl placer, the latter having no standing before this Department. . . .

2. It was error for the local office to receive the so called adverse claim, offered by the Searl placer claimants, as an adverse claim, but said paper should have been received and filed as a protest.

3. There being no pending application by the placer claimants, an application to enter as a lode claim is always in order, the only question being as to width of the lode claims.

It seems that application for patent for the Searl placer was made in 1882. A hearing was had "to ascertain the character of the land and

the status of all existing claims." As a result of that hearing, the application for patent was rejected by the local officers, your office sustained that action, and the Department affirmed your office judgment. (Searl Placer, 11 L. D., 441.)

It is contended by counsel for applicant that the judgment in the Searl placer "was a complete and final adjudication;" that the land embraced therein was not placer ground, and could not be entered as such, hence the adverse claim filed by Searl *et al.*, based as it is upon land for which application for patent has been rejected, ought not to be accepted by the Department as a legal or proper adverse claim, and its application should be received and patent issue notwithstanding.

It is not deemed necessary to enter into an extended discussion of the propositions suggested by counsel. It is sufficient for the purpose of disposing of this case to say that so far as the record here shows the Department is ousted of all jurisdiction until the case now in court is finally disposed of. Under the provisions of section 2326, when the adverse claim is filed all proceedings in the Department "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction."

Last Chance Mining Co. v. Tyler Mining Co., 157 U. S., 683; Richmond Mining Co. v. Rose, 114 U. S., 576; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D., 391; Reed v. Hoyt, 1 L. D., 603.

The judgment of the Department in the Searl Placer case went only to the extent of rejecting the application for patent. The Department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it.

Your office judgment is affirmed.

HOMESTEAD ENTRY—MARRIED WOMAN—RESIDENCE.

WILHELMINA ROTH.

The rule that separate settlement claims cannot be maintained by husband and wife at the same time on different tracts, will not defeat equitable action on a homestead entry made by a single woman, who, prior to the completion of her claim, marries a man having an unperfected homestead entry, if, at such time, the period of residence under his claim authorized the submission of final proof thereon.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 13, 1896. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 32, T. 23 S., R. 38 W., Dodge City land district, Kansas.

The record shows that on July 19, 1887, Wilhelmina Roth, then Wilhelmina Huber, made homestead entry, Garden City series, for the above described tract.

The record shows that on August 4, 1894, Wilhelmina Roth made final proof, after the usual published notice, for the tract covered by

her entry, which, on September 21, 1894, was rejected by the local office. Upon appeal, your office decision of December 4, 1894, affirmed the action of the local officers.

It appears that on July 29, 1891, the appellant was married to Wilhelm Roth, who had on May 15, 1886, made homestead entry for the NW. $\frac{1}{4}$ of Sec. 32, T. 23 S., R. 38 W., and final certificate therein issued May 31, 1893. Patent issued on March 23, 1894, to Wilhelm Johann Roth. The final proof submitted by the appellant on August 4, 1894, was rejected by your office and the local office for the reason that residence could not be maintained by husband and wife on separate tracts at the same time.

In the final proof of the appellant it is shown that she established actual residence on the land in September, 1887, and has resided thereon ever since. The improvements consist of a frame house twenty four by twenty eight feet, shingle roof, granary twenty by twenty feet, frame, shingle roof and stone floor, a stable fourteen by twenty feet; four acres fenced with barbed wire, and about thirty-two acres under cultivation, the improvements altogether being valued at \$600.

In the foregoing recital it appears that Wilhelm Roth made entry on May 15, 1886, and, therefore, at the date of his marriage, July 21, 1891, to the appellant he had been residing upon his claim for a period of over five years, and his wife had been residing upon the land covered by her entry for something over four years.

The Department has frequently held that separate claims by husband and wife can not be maintained by each continuing a separate residence upon the tracts respectively claimed. In this case, though, it is to be noted, that the husband had earned his claim by residence prior to the marriage; he remained, however, on his separate claim until the receipt of final certificate, evidently through a mistaken view of the law which led him to think such continued residence necessary. At the same time his wife continued her residence upon her claim.

While the general rule is that the residence of the wife is presumed to be that of her husband, in this case, in view of all the circumstances, and of the full compliance with the law by the husband, and of the manifest good faith on the part of both parties, I am of the opinion that the equities of appellant are such as are entitled to recognition. I have, therefore, to direct that the case be referred to the board of equitable adjudication on the ground that she resided in good faith upon the tract claimed by her, and that she should not be made to suffer by the mistake of her husband in the interpretation of the law applicable to his claim. As her proof was not made within the seven years it will be necessary, for this reason also, that the case go to the board.

EVIDENCE—PRACTICE—REHEARING.

BENESH *v.* KALASHEK.

An objection to the admissibility of evidence comes too late when raised for the first time on appeal.

A certified copy of an indictment, verdict, and sentence, are properly admissible as evidence tending to establish a charge embraced in the issues tried and determined in the prior criminal proceeding.

A rehearing will not be granted to give a party an opportunity to impeach or discredit the witnesses of the opposite party, especially where it is not even alleged that the evidence thus sought to be introduced is newly discovered.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (E. B., Jr.)

On November 17, 1892, Frank Benesh initiated a contest against homestead entry No. 1540, made by Frank Kalashek May 24, 1889, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 1 and 2 of Sec. 18, T. 11 N., R. 4 W., Oklahoma City, Oklahoma, land district, charging that "the said Frank Kalashek did enter upon and occupy a portion of the lands declared open to entry and settlement by the act of Congress, March 2, 1889, and the President's proclamation of March 23, 1889, prior to 12 o'clock, noon, of April 22, 1889, and subsequent to March 2, 1889, contrary to law." Thereupon a hearing was duly ordered, due notice thereof given, and the case went to trial August 8, 1893, at which the contestant was present in person and by counsel, and the contestee by counsel only.

The contestant rested the submission of his evidence in chief August 9th, and the case was continued until the following day, August 10, 1893, on which counsel for Kalashek moved for a continuance of the case for sixty days on the grounds of the absence of his client from the Territory "under judicial restraint" being "confined in the United States prison at Lansing, Kansas," and thereby "unable to attend in person and give his testimony in said case," that his testimony, and a certified copy of his testimony "given in the case of the United States *v.* Lemuel Perry, and the United States *v.* Anton Caha" were material and important to the issue in this case, and that counsel was not aware of the materiality of this testimony until contestant had closed his case and could not therefore safely proceed with the introduction of testimony. Contestant at once agreed to the filing of all testimony of record in the cases of United States *v.* Perry and United States *v.* Caha as evidence at any time within sixty days, or after that time, if in the judgment of the local officers "due diligence has been used by defendant to procure same," and moved that the case be closed subject to such agreement, which motion was sustained, and the motion for continuance otherwise overruled; and on October 12, 1893, no such testimony having been filed, the local officers closed the case.

On March 31, 1894, the local office decided that the evidence sustained

the charge of the contestant and recommended the cancellation of the said entry, and that contestant be awarded the preference right of entry. April 23rd, following, contestee, by his attorney, moved for a rehearing of the case, which having been overruled by the local office, he duly appealed. The decision of your office under date April 3, 1895, affirmed the action and decision of the local office, throughout, and held the entry for cancellation. Kalashek brings his appeal here, assigning as error, generally, that the decision of your office is against the law and evidence and, in addition, as follows:

In finding affirmatively that the local office had committed no error in their action on the following substantial allegations of error in the appeal of the defendant from the decision of the register and receiver to the Commissioner of the General Land Office:

- (a) In refusing and overruling a motion for continuance.
- (b) In admitting oral testimony to establish facts alleged to exist in the record.
- (c) In admitting the record of the case of the U. S. *vs.* Kalashek and considering it as evidence in the case.
- (d) In requiring Kalashek to proceed with the trial after his enforced absence was shown and prematurely closing the case.
- (e) In making the case special and deciding it out of its regular order, thereby preventing an application to have the case re-opened before a decision was rendered.
- (f) In denying a re-hearing on the showing made.

At the hearing of the case before the local office the contestant put in evidence a duly certified copy of the indictment, verdict of guilty and sentence of Kalashek for perjury, in the case of *United States v. Kalashek*, in the district court of the United States for the district of Kansas; the perjury consisting, as shown by said certified copy, in his falsely swearing in the case of *Anton Hauck v. William Robert Williams*, before the local land office at Kingfisher, Oklahoma Territory, that himself (Kalashek) and said Hauck did not enter the Oklahoma country until after 12 o'clock, noon, of the 22nd of April, 1889, whereas, in truth and in fact, they both entered said country long prior to that hour and subsequent to March 23, 1889.

Two witnesses at the hearing, one of whom was said Hauck, testified to seeing Kalashek within the Oklahoma country, at Raymond's sod house near the land, on the morning of April 22, 1889, several hours before noon; two others testified to admissions by Kalashek of similar import made out of court; and two others, in addition to one of those last above mentioned, three in all, testified to hearing Kalashek admit to the same effect under oath while a witness in the case of *United States v. Caha* in the United States district court at Wichita, Kansas, in March, 1893.

Considering, now, the alleged errors of the local officers, above quoted, the record shows that the motion for continuance was granted except as to testimony, other than that alleged of record, of Kalashek, who was then incarcerated in the Kansas State Penitentiary under sentence March 31, 1893, for the term of one year and one day, upon conviction of perjury hereinbefore indicated, and who could not therefore have testified orally at the hearing within the sixty day's continu-

ance asked (Par. 6, Rule 20 of Practice). Furthermore, the motion did not set out the facts to which he would testify if present (Paragraph 3, Id.). There had been ample time between the personal notice, May 11, 1893, to Kalashek, and the date of the hearing, to have taken his deposition under the Rules (23 and 24). No application was made at any time to take it. Under all the circumstances, and in view of contestant's evidence, I am of opinion that contestee's case was not prejudiced by the overruling of his said motion.

The "oral testimony" claimed to have been improperly admitted is that relating to Kalashek's admissions as a witness in the said case of *United States v. Caha*, it being assumed, apparently, by contestee that his testimony in that case formed part of the record of the court therein. As the judgment of the court in that case appears to have been acquiesced in without appeal or writ of certiorari, there is no foundation for the above assumption. But, even if Kalashek's testimony were of record in that case, so that the same or a certified copy thereof might have been introduced in evidence, he cannot now be heard to assign the admission of said "oral testimony" as error, on appeal, for the reason that he did not object to it as secondary evidence when it was offered.

The certified copy of the said indictment, verdict and sentence were clearly admissible as evidence tending to show the truth of the charge of "soonerism" against Kalashek.

What has been already said herein in the matter of the motion for continuance sufficiently disposes of the specification as to requiring Kalashek to proceed with his case. It does not appear that the case was prematurely closed before the local office.

It does not appear that the case was made special nor decided out of its order.

One ground urged in the motion for rehearing before the local office was that, if granted opportunity contestee would impeach and contradict the witnesses who testified to his presence in Oklahoma Territory on the morning of April 22, 1889. No reason is suggested why contestee's witnesses, saving only himself, were not brought forward at the hearing. It is well settled that a re-hearing will not be granted simply to give a party opportunity to impeach or discredit witnesses of the opposite party, and especially when it is not even alleged that the testimony thus sought to be introduced is newly discovered (*Sutton et al. v. Abrams*, 7 L. D., 136). The other grounds for this motion were incorporated in the alleged errors which I have already sufficiently considered. The local office properly overruled this motion.

The evidence abundantly sustains the charge made by the contestant. Kalashek was disqualified to make said entry by reason of his violation of the act of March 2, 1889, and the President's proclamation in pursuance thereof, in entering the Territory of Oklahoma on the morning of April 22, 1889. The decision of your office is affirmed. His entry will be canceled and Benesh be given the preference right of entry.

OKLAHOMA HOMESTEAD—COMMUTATION.

GUY M. HATFIELD.

The non-townsite affidavit, form 4-102c, required in the case of an Oklahoma homestead commuted under section 21, act of May 2, 1890, though not expressly provided for in said act, is a proper regulation in the execution thereof; and the affidavit thus required should be executed within the county or district where the land is situated.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (C. J. W.)

On October 14, 1893, Guy M. Hatfield made application, No. 1677, to enter the SE. $\frac{1}{4}$ of Sec. 15, T. 20 N., R. 9 W., Oklahoma, under section 2290, Revised Statutes.

December 11, 1894, he gave notice of his intention to submit commutation proof, and on January 24, 1895, such proof was submitted, and final certificate No. 14 was issued. The non-townsite affidavit (form 4-102c), required to be filed in cases of commuted homestead entries in Oklahoma, was omitted.

April 11, 1895, your office, by letter "C" of that date, instructed the register and receiver to notify Hatfield of said omission, and to allow him sixty days within which to file said affidavit, and that upon failure to do so his entry would be canceled, without further notice.

On May 6, 1895, Hatfield appealed from said decision, and at the same time made an affidavit before a notary public, in Benton county, Arkansas, in which he states that he made said entry for agricultural purposes, and that it was not then used for a townsite, and is not now so used.

On the 20th of January, 1896, having obtained one of the printed forms used in such cases, he filled the blanks and made the required oath before the county clerk of Benton county, Arkansas.

Two questions are presented by the appeal:

1st. Has the Commissioner of the General Land Office authority to require the filing of a non-townsite affidavit as a part of the commutation proof, under Sec. 21 of act of May 2, 1890 (26 Stat., 81).

2d. If he has, is the affidavit now submitted a compliance with said requirement?

By letter "C" of May 9, 1891 (Vol. 75, Oklahoma letter-press copy-book, page 399), your office ordered registers and receivers in Oklahoma to require applicants to commute homestead entries to file non-townsite affidavits, and furnish them with blank form 4-102c.

While said act of May 2, 1890, contained no express authority for issuing such order, the law provided a method for commuting a homestead to a cash entry for townsite purposes at ten dollars per acre, while for strictly homestead purposes, the commutation price was much less. Without some such regulation as the one in question, the law

authorizing commutation of homestead entries for townsite purposes could be abused and evaded, and frauds practiced upon the government. The power to provide against the evasion of the law, by necessary and reasonable regulations in its execution, is implied, where the exercise of such power is not violative of, or inconsistent with the law itself. The order in question is a reasonable one, not inconsistent with the law, but in furtherance of its purpose, and will have the force and effect of law until revoked.

This disposes of the appeal, and the question remains, is the affidavit now offered a compliance with the law and said order.

This question is answered in the case of Edward Bowker (11 L. D., 361), wherein it is held, that such affidavits must be made inside of the county or district where the land is situated.

Your office decision is accordingly approved, with the modification, that Hatfield will be allowed sixty days from notice of this decision within which to file the required affidavit.

RAILROAD GRANT—RELINQUISHMENT.

GRAFF v. PASCHOLD ET AL.

The relinquishment by a railroad company of a tract falling within the terms of its grant can not be accepted, if prior thereto the company has parted with its title to said land.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 13, 1896. (W. M. W.)

I have considered the appeal of Joseph Graff, Sr., from your office decision of September 7, 1895, rejecting his application to make homestead entry for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 7 N., R. 7 E., Lincoln, Nebraska, land district.

This tract is within the twenty mile limits of the grant to the Burlington and Missouri River Railroad Company under the act of July 2, 1864 (13 Stat., 356), south of its road and opposite that part of the road which was definitely located June 22, 1865. At date of definite location the records of your office show no entry or filing upon said land.

On June 5, 1871, George A. Mohrenstricker made homestead entry for the tract, which was canceled by relinquishment January 22, 1872.

On February 26, 1872, L. C. Herman Mahn made homestead entry for said tract. Said entry was canceled by your office December 1, 1873.

On March 17, 1874, John Krause made homestead entry for it, which entry was canceled by your office July 16, 1875.

On February 17, 1888, Adolph H. Wessel made homestead application to enter said tract.

On February 9, 1892, Christian Paschold made application to enter said tract as an additional homestead.

On February 23, 1894, Joseph Graff, Sr., made application to enter said tract under the homestead law.

On February 20, 1894, Seibelt Poppenga made application to enter said tract under the homestead law, and also to contest the right of Paschold to enter the land in question.

Each of these applications was rejected by the local officers on the ground that it conflicted with the grant to the railroad company.

Each of the applicants appealed.

On September 13, 1894, your office held that the land in question passed to the railroad company under its grant, and is not subject to entry, and, therefore, affirmed the judgments of the local officers rejecting each of said applications.

The applicants to enter appealed to the Department.

While the appeals were pending here, and before the cases were reached for disposition in their order, on August 13, 1895, Messrs. Thompson and Slater addressed to you a letter, as follows:

Hon. S. W. LAMOREUX,

Commissioner of the General Land Office,

Washington, D. C.

SIR: We have the honor to respectfully refer to your letter, dated September 13, 1894, Division F., initials J. S. J., and to your letter of February 12, 1895, same division, initials J. F. S. We beg leave to waive the right of the Burlington and Missouri River Railroad Company to said land in favor of Christian Paschold, and to request that it be patented to said Christian Paschold.

Very respectfully,

THOMPSON & SLATER,
Attorneys B. & M. R. R. Co.

This letter was transmitted to the Department, and on August 19, 1895, its receipt was acknowledged, and thereupon the papers were returned to your office without departmental action.

On September 7, 1895, your office accepted the company's waiver of its right to the land, without admitting its right to waive in favor of any particular person, and, after referring to certain affidavits filed in the cases, held that

none of the parties acquired any right under their respective applications, made at a time when the land was not subject to entry, and that now, the bar to entry having been removed by the company's waiver of its right, Paschold has the superior right to enter and should be permitted to do so upon making application in due form.

Graff appeals.

One of the errors assigned is as follows:

5. The Commissioner erred in deciding that Paschold has the superior right to enter and should be permitted to do so upon making application in due form, for the reason that the question of the right of said parties, or any of them, to make new entry, according to law, was not before the Commissioner for determination and the Commissioner had no right to determine said question.

The holding of your office that none of the parties acquired any rights under their respective applications was unquestionably right. The further holding that Paschold has the superior right to make entry of the land in the future, in case he may see fit to make proper application therefor, is clearly erroneous.

The most important question, however, is, whether the land in question is, under its present status, subject to entry and disposition under the public land laws. This question must be determined before any steps can properly be taken toward such disposition.

The alleged relinquishment of the railroad company does not run to the United States. It is not signed by any officer of the railroad company. It is signed by a firm of attorneys, who are not shown to have authority from the company to convey real estate. It only relinquishes the land in favor of Christian Paschold, and requests that it be patented to him. After the case was returned to your office viz., on September 6, 1895, the same attorneys addressed another letter to you, inclosing the affidavit of Joseph Hansel and Ernest Ehrlich, and saying:

The said company, in view of the fact that Paschold is in possession of the land and has made valuable improvements, does not make claim to said land. The company is aware of the fact that this land is within the limits of its grant, but desires to protect the settlers and its patrons, and therefore waives all of its rights in favor of the said Christian Paschold, and requests that a patent be issued to him at an early day.

The affidavit of Hansel and Ehrlich, forwarded with this letter, shows that on October 19, 1893, Adolph Wessel purchased the west half of the land in question for the sum of \$600; that Wessel made quite a number of payments upon said land to said railroad company, and afterward sold by written contract all his right, title, claim, interest and demand to said land to Christian Paschold; that on the 19th day of October, 1893, Christian Paschold purchased from the railroad company the east half of the land in question, and agreed to pay \$600 for it; that he

paid said company the sum of \$60.00, and took their contract in writing at that date, which is No. 22,540, and the same is signed by J. J. McFarland, Commissioner: A. A. Mead, Secretary.

There is also an affidavit of Christian Paschold in the record before me, which refers to the above-mentioned contracts of purchase from the railroad company, varying only as to their date, which he says was October 19, 1883. He also sets out a copy of the agreement between Adolph H. Wessel and said Paschold, wherein Wessel, in consideration of \$1,000, sold to Paschold:

The east one half of the east one half (E. $\frac{1}{2}$ of the E. $\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$) and the west half of the east half (W. $\frac{1}{2}$ of the E. $\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$), all of section twenty-nine (29) town seven (7) range seven (7), east of the 6th P. M., containing acres more or less.

This land has never been patented to the railroad company. The granting act, section 19 of the act of July 2, 1864 (13 Stat., 356-364), provides:

That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

This language clearly imports a present grant, and although the 20th section of the act provides for the issuance of patents to lands granted by it, I am of opinion that the granting act itself passed such a title to the company to the land in question as to require a formal conveyance or waiver by the company through the action of an officer or agent of the company who has the power to convey its real estate. There is nothing to show that Thompson and Slater, who filed the company's waiver, were such officers or agents of the company, or had the power to convey its real estate.

The relinquishment or waiver of the company's rights under the grant, if it were made in due form by a competent officer of the company, could not be accepted by the government as the matter now stands, for the reason that it appears that the company, through its authorized officers, has sold the land in question, and whatever right the company had to it under its grant is vested in Paschold. Under such circumstances, it is clear that the land department cannot acquire jurisdiction to hear and determine controversies respecting the land, or dispose of it under the public land laws, for the reason that the land involved is not public land of the United States.

For the foregoing reasons, your office decision of September 7, 1895, is reversed. And your office decision of September 13, 1894, in so far as it holds that the land in question is not subject to entry, and its action rejecting the applications of Adolph H. Wessel, Christian Paschold, Joseph Graff, Sr., and Seibelt Poppenga to enter said land, is hereby affirmed.

HOMESTEAD ENTRY—FINAL PROOF—RESIDENCE.

WILLIAM B. ROSS.

Temporary absences occasioned by the homesteader's physical incapacity to personally improve and cultivate the land do not impeach the good faith of his residence.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (A. E.)

In this case William B. Ross made homestead entry on March 8, 1887, for the SW. $\frac{1}{4}$, Sec. 28, Tp. 30 S., R. 45 W., Lamar, Colorado. On

November 4, 1893, Ross submitted final proof; as this showed that he had been absent from the land keeping a hotel, he was called upon by your office letter of July 23, 1894, to furnish an affidavit, duly corroborated, definitely stating the number and duration of his absences and why he had cultivated the land for two seasons only. The answer of Ross not being deemed sufficient to excuse his failure to live upon the land continuously, your office, on November 8, 1894, held the entry for cancellation.

From this Ross appealed, and with his appeal files an additional affidavit. This, together with the proof, shows that Ross used the land the first three seasons for grazing purposes; that he has placed upon the land improvements to the value of \$1,200, consisting of sod house, frame house, frame barn, buggy shed, cattle shed, corral, eighty acres under three wire fence, sixty acres of breaking, and seventy-five forest trees; that he broke four acres the first year, twenty in 1892, and sixty in 1893; that he is a man over sixty years of age, and an invalid and unable to do hard labor; that when he settled on the land it was sixty miles from the nearest railroad, and he engaged in the hotel business in order to obtain money with which to improve and cultivate his claim; that he has maintained no other legal residence but on the land since 1887, and has not voted in any other precinct. He likewise shows that he has used the land for agricultural purposes each year since entry.

The continuous improvement and cultivation of this land by Ross, the fact that he was compelled to work at some other occupation because of his inability to perform manual labor, his adhering to the land as his place of legal residence, all indicate his good faith and practical compliance with the homestead law. His absences were only occasioned by the necessities of the case. Being physically incapacitated to personally perform acts of cultivation and improvement, it was no violation of the spirit of the homestead act for him to engage in other works when the proceeds of said work were used to fulfill the acts which the law required. All the actions of Ross in this case, in and about his claim, indicate good faith, and the results show despite great difficulties a substantial and even successful compliance with the law.

In view of these facts, your office decision is reversed, and you will accept the final proof and pass the entry to patent.

COAL LAND—PROTEST—ASSIGNMENT—RELINQUISHMENT.

OUIMETTE *v.* O'CONNOR.

On the offer of final proof under a coal declaratory statement, and the appearance of an adverse claimant who protests against the allowance of said proof, the protestant should not be required to introduce testimony if the final proof as submitted is clearly insufficient under the regulations.

The purchaser of the improvements made by a prior claimant under a coal declaratory statement acquires no priority of right thereby, if an assignment of the right to purchase from the government has not been made as provided in paragraph 37 of the regulations of July 31, 1882.

On the relinquishment of a coal declaratory statement the improvements made thereunder inure to the benefit of a valid adverse claim then asserted for the tract involved.

Sections 2348 and 2349, R. S., do not require that a coal claimant must have opened a mine on the land at the time of filing a declaratory statement therefor.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (J. A.)

The land involved herein is the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 19 N., R. 6 E., Olympia, Washington, land district.

Charles S. Bridges filed coal declaratory statement for said tract August 28, 1893. April 7, 1894, Jeremiah O'Connor filed a coal declaratory statement alleging that he came into possession of the land March 21, 1894, but failing to state whether he had opened a vein of coal thereon. October 2, 1894, Bridges relinquished his right to the land, and on the same day Norbert Ouimette filed a declaratory statement, executed September 29, 1894, alleging that he came into possession of the land on September 14th; that he has expended \$5,000.00 in labor and improvements on a coal mine; and that the improvements consist of "a regular gangway 500 feet long, chutes, counter gangway, air chutes well and safely timbered, 1600 feet of rails, coal bunkers, switches and stable, (and) a vein of coal 4 $\frac{1}{2}$ feet in thickness." November 5, 1894, he filed an affidavit alleging that O'Connor is not a lawful claimant for the land, has made no legal filing, and is in all respects seeking to acquire title unlawfully and to the serious injury of the affiant. He therefore requested to be allowed to cross examine O'Connor and his witnesses when O'Connor offers his final proof.

November 9, 1894, O'Connor appeared and without notice to Ouimette made application and oath before the register of the local office, substantially in the form prescribed by paragraph 23 of the circular of July 1, 1882, 1 L. D., 687, in cases where title is sought by private entry under Sec. 2347 R. S. With the application he filed two corroboratory affidavits, from which it appears that he had not opened any vein of coal on the land.

At the same time Ouimette filed a protest, sworn to October 8, 1894, as follows:

Now comes Norbert Ouimette coal claimant for the above tract and under oath protests against the purchase of the same by one Jeremiah O'Connor, who claims priority of filing and adverse possession. That said O'Connor made no improvements prior to affiant's filing and his improvements thereon. That affiant has by purchase and otherwise made valuable improvements upon said land opening up a coal mine, and working the same. That said improvements are worth about \$5,000.

That said O'Connor has opened no mine and made no developments as required by law, and this affiant is prepared to substantiate these charges whenever and wherever the Hon. Register of the U. S. land office Olympia, Wash., to whom this is directed, may direct an investigation, and such investigation is the prayer of this affiant.

Thereupon the local officers suspended action on the proof offered by O'Connor, and ordered a hearing for December 12, 1894.

On the day appointed for the hearing Ouimette moved that O'Connor's proof be rejected because of its insufficiency and that his declaratory statement be held for cancellation. The motion was denied. The attorney for Ouimette then made the following statement: "It appearing that the proof of O'Connor is absolutely insufficient upon its face, claimant Ouimette has no testimony to offer in rebuttal and will take exceptions to the ruling and exercise his right of appeal to the Hon. Commissioner of the General Land Office." The local officers thereupon dismissed Ouimette's protest, and, on the holding that O'Connor's proof is sufficient under paragraph 23 of the regulations of July 31, 1882, accepted the purchase money and issued duplicate receipt to him.

December 26, 1894, Ouimette appealed to your office.

December 31, 1894, O'Connor, without notice to Ouimette, filed an affidavit in the form prescribed by paragraph 32 of the regulations of July 31, 1882, alleging that he has expended \$350.00 in making improvements on the land; that his improvements consist of the following work:—"Cutting trails through the timber, so the land could be prospected and surveyed. Surveyed the tract; worked upon coal veins thereon; (and) following and tracing coal veins preparatory to active mining operations." This affidavit is insufficient under paragraph 16 of the regulations of July 31, 1882, in that O'Connor did not state whether he had "opened and improved" any coal mine on the land.

March 25, 1895, your office rendered decision on Ouimette's appeal, treating him as a contestant and dismissing his "contest" on the holding that the insufficiency of O'Connor's proof is a matter solely between O'Connor and the government, that Ouimette can not be heard to object to O'Connor's proof, and that it was necessary for him to introduce evidence in support of his allegations. Ouimette's coal declaratory statement was therefore rejected and O'Connor's entry was suspended to be further considered in the event of the decision becoming final.

Ouimette's appeal from said decision brings the case before me for consideration.

Your office erred in treating Ouimette as a mere contestant. He was an adverse claimant, and therefore, under the regulations of July 31, 1882, his motion should have been granted to the extent of rejecting O'Connor's proof, which was insufficient under paragraphs 18, 19 and 20 of the regulations of July 31, 1882, 1 L. D., 687. No useful purpose could have been subserved by cross-examining O'Connor and his witnesses. In view of the insufficient proof made by O'Connor Ouimette could not be required, at the time set for the hearing, to introduce testimony under his protest, or to offer proof in support of his claim of prior right. It follows that your office erred in suspending O'Connor's entry for further consideration, and in rejecting Ouimette's coal declaratory statement. The decision appealed from is accordingly reversed.

Ouimette's protest, above set out, is not very definite. It seems that he did not open a vein of coal on the land, but that Bridges, the prior claimant, had opened a vein and made valuable improvements, and that he bases his claim of prior right mainly upon the work done by Bridges. Ouimette acquired no right whatever by his purchase of the improvements, as Bridges made no assignment of the right to purchase under paragraph 37 of the regulations of July 31, 1882. Immediately upon the filing of Bridges' relinquishment the work done by him on the land inured to O'Connor's benefit if O'Connor's claim was valid. What the nature of this work was does not appear. The mere inference that the work consisted of the opening of a vein of coal does not warrant the finding that such is a fact.

In an argument filed while the case was pending in the your office, Ouimette stated that he is in possession of the land and is developing a well-known coal mine, and that the superior court of Pierce county, wherein the land is situated, has enjoined O'Connor from interfering with his work. In an argument filed in support of his appeal from the decision of your office he alleges that O'Connor, on the strength of the duplicate receipt issued to him by the local officers, has been placed in possession of the land by an order of said court. These statements could have no weight in the case even if they were properly before me as evidence, as the orders of the courts in regard to the possession of the land do not affect the rights of the parties.

It is contended by counsel for Ouimette that a coal claimant must at the time of his application have opened a vein of coal and that he must so allege in his declaratory statement, and that O'Connor's declaratory statement is insufficient as it does not in this respect follow the form prescribed by paragraph 28 of the regulations of July 31, 1882.

Section 2348 R. S. provides as follows:

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved.

Section 2349 R. S. provides that:

All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor.

Paragraph 28 of the regulations of July 31, 1882, provides that the declaratory statement must substantially follow the form prescribed by said paragraph. The following statement is found in the form, with reference to the improvements on the land: "that I have located and opened a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of —— dollars, the labor and improvements being as follows." This form need only be substan-

tially followed, and was intended for an applicant who had "opened" a vein of coal. As sections 2348 and 2349 R. S., do not require that a claimant must have opened a mine on the land at the time of presenting his claim O'Connor's declaratory statement is sufficient.

The fact that O'Connor had been in possession of the land from March 21, 1894, to November 9, 1894, the date of his proof, without opening a vein of coal, and that he offered insufficient proof without notice to Ouimette, is suggestive of bad faith but does not warrant a finding on that question. As the proceedings before the local officers appear to have been unskilfully conducted, and as the record before me is unsatisfactory, both parties should be given an opportunity to submit evidence in support of their respective claims. You will therefore direct the local officers to order a hearing between Ouimette and O'Connor at which O'Connor will be allowed to show whether Bridges had opened a vein of coal on the land prior to the filing of his relinquishment, October 2, 1894, and at which the parties may introduce such further evidence as to them seems proper.

RAILROAD GRANT—ADJUSTMENT—LATERAL LIMITS.

FAY *v.* UNION PACIFIC RY. CO.

An applicant for a tract of land falling within the limits of a railroad grant as adjusted on the map of definite location, cannot be heard to allege that the land is in fact outside the limits of the grant as shown by actual measurement from the line of road as constructed.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 25, T. 18 S., R. 6 W., formerly Larned, now Dodge City land district, Kansas.

The record shows that in March, 1884, the local officers rejected the application of George W. Fay to file pre-emption declaratory statement for the above described tract. Upon appeal on July 26, 1884, your office decision was rendered affirming the action of the local officers.

This tract is within the limits of the grant to the Union Pacific railway company, and nothing appears of record as a pre-existing valid adverse right prior to the grant being adjusted upon the definite location of the road. The tract of land is within the limit of the road so adjusted.

The sole reason for the appeal is, that by actual measurement the tract of land is more than twenty miles from the line of the road of said company, and, consequently, could not pass to the said railway company.

In *Scott v. Kansas Pacific railway company* (5 L. D., 468), the method of adjusting railroad grants was determined to be as follows:

The lateral limits of the grant are determined by drawing lines on each side of the route of the road through a series of points, at the precise distance therefrom of the

width of the grant, on tangential lines, the arcs having a radius equal to the width of the grant on each side of the road. By this system any point on the lateral limit will be distant the length of such radius from some point on the road as located.

In *Van Wyck v. Knevals* (106 U. S., 360, page 369 thereof), Mr. Justice Field said:

As to the alleged deviation of the road constructed from the road laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of route without the consent of Congress, so far as to take the road beyond the lands granted, might, perhaps, raise the question whether the grant was not abandoned; but no such question is here presented. The deviation within the limits of the granted lands in no way infringes upon any rights of the defendant.

The Department in the case of the Chicago, St. Paul, Minneapolis and Omaha railway company (6 L. D., 209), passed upon the question at issue in which it held (syllabus):

Deviations in the construction of the road from the line of definite location, rendered necessary to avoid engineering obstacles, or remedy defects in the original location, not destroying the identity of the road constructed with the one located, and confined within the limits of the grant, will not defeat the right of the company to the land conferred by the grant.

From these authorities it will appear that the rights of the road attach and are adjusted upon the basis of the map of the definite location as filed. It would follow, that anywhere within the grant so definitely located the road may be actually constructed; and without passing upon the question of what would be the effect upon the grant were the road constructed outside of such fixed boundaries, it is sufficient to say, that it may be constructed anywhere within said boundaries as determined by the map of definite location.

The appellant in this case cannot be heard to complain that the tract of land sought to be entered by him is in fact more than twenty miles from the constructed road; such action has not redounded to his injury, and the railroad gets no more by reason of taking on one side of the track land more distant than twenty miles, because there would be a corresponding loss upon the other side.

The decision appealed from is affirmed.

HOMESTEAD ENTRY—ALIENATION—CONTRACT TO CONVEY.

DAWSON ET AL. v. HIGGINS.

An agreement for conveyance that could not be enforced in a suit to compel specific performance, and that may be avoided by the payment of a money consideration, does not operate as a disqualification of the entryman, nor will a contract that is simply a pledge for the payment of money; and especially will such contracts be so regarded where they appear to have become of no effect prior to the date of the entry.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 13, 1896. (E. B., Jr.)

This case involves the SW. $\frac{1}{4}$, section 33, T. 12 N., R. 3 W., Oklahoma Territory, and comes before me on appeal by John M. Dawson and the West Oklahoma Townsite Company from the decision of January 20, 1896, by your office, sustaining the homestead entry, No. 9660, of Robert W. Higgins made at Oklahoma City, Oklahoma Territory, March 6, 1895, for the land above described, and accepting and approving Higgins' final proof for the same.

On June 29, 1894, I decided the case of Higgins *et al.* v. Adams (18 L. D., 598), involving the said tract, awarding the preference right to make homestead entry thereof to Higgins. In that case said Dawson and the West Oklahoma Townsite claimants said Higgins and others were contestants against the entry of Adams, and the question, only, of "soonerism" and priority of right to the land were decided. Motions for review and rehearing were denied by me January 30 and June 5, 1895, respectively. Your said office decision further sets out the record and states as follows:

The record now here shows that on March 6, 1895, Robert W. Higgins at your office, made homestead entry No. 9660, for the SW. $\frac{1}{4}$, Sec. 33, T. 12 N., R. 3 W., I. M.; that on August 21, 1893, John M. Dawson filed in your office an affidavit of contest, corroborated by one Mrs. F. E. Carter. This affidavit referred in terms to the contest case of "John M. Dawson v. Robert W. Higgins and J. C. Adams," averred Dawson's acquaintance with "Robert W. Higgins, one of the contestants in the above entitled action," and charged on information and belief, that "said Higgins made a contract with different parties to convey a portion of said land to said parties in consideration of certain sums of money paid to him as soon as he could obtain title to said land; that said contract and agreement were illegal &c.; that by making said agreement and contract Higgins disqualified himself from making entry for said lands." In conclusion affiant, Dawson, asked that you order a hearing on the charge made.

April 3, 1895, said John M. Dawson filed in your office an affidavit corroborated by one Miller, entitled "John M. Dawson v. Robert W. Higgins, supplementary and amendatory affidavit of contest," being amendatory, as he declares, of his aforesaid affidavit of contest of August 21, 1893. This last affidavit sets forth in detail the contract referred to in the aforesaid affidavit of August 21, 1893, which contract appears to have been made between Higgins, Anson Wall, and Samuel Murphy on the 30th day of May, 1890. For an "additional cause of action" said supplementary affidavit charges error in allowing Higgins to make homestead entry on March 6, 1895, because at that time he, Dawson, was residing on the tract in question and had "a house, fencing, well, stable, outbuildings, plowed ground and divers other perma-

ment and valuable improvements," and that he "had a contest pending against the said R. W. Higgins."

March 23, 1895, an affidavit of contest against the entry of Higgins in the name of the "West Oklahoma Townsite Company" was duly made and filed by Franklin Springer, alleging, on information and belief, that said Higgins had entered into a contract with one William W. Butler, or W. M. Butler, for a certain consideration, to deed said Butler "a one half interest in and to said tract of land when title is acquired from the United States."

April 12, 1895, a stipulation was entered into by all parties and filed, for a hearing on the 17th of April, 1895, "to determine the priority of rights as to the contestants, the setting of said cause for trial to be determined by the register and receiver on that date, after it has been determined which of said contests is the first contest and entitled to proceed against the entry."

In this matter of priority, on April 20, 1895, you rendered a joint opinion dismissing both affidavits of contest.

From this opinion Dawson and the "West Oklahoma Townsite settlers" (company) duly appealed, by their respective attorneys.

March 6, 1895, Higgins duly advertised to make final proof on his entry on April 13, 1895. Upon filing the stipulation aforesaid, and pending argument and decision thereunder, said proof was set down for April 22, 1895, when on that day entryman, Higgins, and his advertised witnesses appeared and submitted testimony. Also appeared John M. Dawson by his attorneys and the West Oklahoma Townsite Company, by attorneys, and protesting, proceeded to cross-examine claimant.

Dawson, stating the contract alleged in his aforesaid supplementary affidavit of contest, as made between Higgins, Wall and Murphy, examined Higgins thereon. The making of the said contract or agreement was admitted by Higgins. It was further admitted by Higgins that he had made another contract with one W. M. Butler, as to which contract Higgins was examined by counsel for the Townsite Company.

The contract stated by Dawson was as follows:

"This agreement made and entered into at Oklahoma City by and between Anson Wall and Samuel Murphy parties of the first part, witnesseth:

"That said Anson Wall and Samuel Murphy parties of the first part agree to pay to said R. W. Higgins the sum of twenty dollars per month from date of this contract to be paid in four equal weekly installments, said monthly payments to be paid the said R. W. Higgins each month until the said Higgins has a hearing and determination of a contest suit now pending in the United States Land Office at Guthrie, Oklahoma Territory, wherein the said R. W. Higgins *et al.* are contestants and J. C. Adams is contestee, involving title to the SW. $\frac{1}{4}$, Section 33, T. 12 N., R. 3 W.

"In consideration of the above mentioned \$20 per month the said R. W. Higgins agrees that in the event he is successful in the above mentioned contest, that he will pay said Anson Wall and Samuel Murphy a sum equal in value to one-fourth of the SW. $\frac{1}{4}$ of Sec. 33, T. 12 N., R. 3 W., or in the event of his being unable to pay said sum of money as aforesaid, he will make and execute a deed to one undivided one-fourth of said SW. $\frac{1}{4}$ to the said Anson Wall and Samuel Murphy.

"And it is expressly agreed and understood by and between the parties hereto that in the event of a compromise or settlement of said contest, whereby all parties above named, with the said Anson Wall and Samuel Murphy shall have one-fourth of all money that may or shall be obtained by said R. W. Higgins by virtue of said compromise; or, in other words, it is understood by all parties hereto that said Wall and Murphy are to become interested in the land heretofore described to the extent of one-fourth or forty acres, and whatever disposition may be made of the same, the said Wall and Murphy are to have one-fourth interest in the same.

"Signed and sealed at Oklahoma City this 30th day of May, 1890.

[SEAL.] "ANSON WALL.

[SEAL.] "SAMUEL MURPHY.

[SEAL.] "ROBERT W. HIGGINS."

Upon the close of the cross examination the case was continued to April 23, 1895, and again to May 6, 1895, "for the purpose of enabling claimant to furnish for inspection the original agreement made by entryman Higgins with Wm. Butler."

May 6, 1895, said original agreement was submitted to you and a certified copy made and attached to claimant's proof.

Thereafter, on June 1, 1895, you endorsed on Higgins' final proof "rejected because of the adverse claims of J. M. Dawson and the West Oklahoma Townsite Co., 30 days allowed for appeal."

From this rejection Higgins duly appealed.

In your letter of June 15, 1895, transmitting the rejected proof of Higgins and his appeal, you say:

"Our action in rejection is not supposed to cause any bias favorably toward the plaintiff, but merely to have your honor determine the question of contract, &c.—all of which Robert W. Higgins is frank enough to admit."

The certified copy of the agreement of Higgins with Butler, attached to his said proof, reads:

STATE OF KANSAS MONTGOURY CO.

Caney May 8th, 1889.

This agreement made and entered into by Robert W. Higgins and William Butler and S. A. Higgins wife of Robert W. Higgins and M. S. Butler wife of William Butler Partys of first Robert W. Higgins and S. A. Higgins Partys of first for the consideration of money to Bild a Hose the cost to not to exceed three hundred Dollars By second Partys William Butler and M. S. Butler also Second Partys are to furnish money to Fenc $\frac{1}{4}$ Section of said land heare in after discribed with Post and three wire and the Second Partys is Pay all Expense not Exceed \$250.00 Securing the title to the SW. $\frac{1}{4}$ of Sec. 33 of T. 12 of R. 3 west and the said Partys of First is the legal owner of said described Land and has Witness to Prove the Same as his homestead by the Presidents Proclamation on said Lands in Oklahoma and that the first Agree and hold Binding at the Expiration of Sixth moth Or as the time may be fixed by the Land Commissioner to Proove up said Land as Specific by Law. The firstys Partys is to Relinquish to the Second Partys one Fourth its value of said land Sec. 33 T 12 of R 3 West in Oklahoma for the Provisions Mention heare in the Second Partys is to Bild the hose fourth with and to fence the same as Describe amediately.

(Signed)

ROBERT W. HIGGINS,
S. A. HIGGINS,
WILLIAM BUTLER,
M. S. BUTLER.

Witness:

T. W. HODGES.

Witness to Robert W. Higgins and William Butler's signature:

F. G. DYE.

It is contended in support of the appeal here that the contracts above set forth, and which Higgins admits he executed, conclusively establish his disqualification as an entryman, and that the rejection of his final proof and the cancellation of his entry must necessarily follow.

It is claimed on the part of the entryman that these contracts were before the Department in connection with the motion for a rehearing heretofore mentioned and their effect determined at that time by reason of which that question is *res judicata*. It is further claimed that said contracts are not of the character contemplated by the alienation or agreement to alienate the land claimed under the homestead law, and hence do not affect Higgins' qualification as a homestead entryman.

It is true the contract between Higgins on the one side and Anson and Wall on the other was brought to the attention of the Department in connection with the motion for review and rehearing in the former case. The question presented as to this part of the case was as to whether the decision sought to be reviewed was in error, in that it did not hold that it was error on the part of the local officers to exclude testimony offered at the hearing to show that Higgins had disqualified himself as an entryman for this tract, by reason of having executed a contract to convey an interest in said land. The Department held that the facts presented did not show proper ground for a review or rehearing. This determination did not necessarily involve the question as to the effect of the execution of that contract, nor did it prevent the presentation of that question in a proper manner at a later date. The doctrine of *res judicata* ought not to be applied in this case.

If these contracts, or either of them, are of that character which would make a *prima facie* case against Higgins then his entry should be canceled or a further hearing ordered to disclose all the facts in connection therewith.

The affidavit required as preliminary to the allowance of a homestead entry was made by Higgins on March 2, 1895, and in the form prescribed under section 2290, Revised Statutes, as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095). In this affidavit he alleges, among other things:

That I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatever by which the title which I might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself.

With his final proof he submitted an affidavit, as required, in which he alleged

that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, and that I am the sole *bona fide* owner as an actual settler.

The law at the time of Higgins settlement, of his application to make entry and at the date of the contracts in question, required the person applying to make a homestead entry to file an affidavit stating, "that such application is made for his exclusive use and benefit," and that his entry is made for the purpose of actual "settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person."

The object of the requirement is the same in both cases, that is, to prevent the making of an entry for other purposes than the securing of a home. The more certainly to obtain this object the law was amended to require statements more specific in character than were required formerly.

The agreement with Anson and Wall is not an absolute agreement for conveyance. It is not such an agreement as would in a suit to compel specific performance require or justify a decree for conveyance of the land. This statement is made upon the theory that all question as to public policy is eliminated. It is an agreement, which Higgins might at any time have avoided by the payment of a money consideration. As a matter of fact, he states upon cross-examination in behalf of Dawson, that the agreement had been rescinded some three years prior to the making of the entry, and had become from and after that time null and void. This being true he could rightly make the statements contained in his preliminary affidavit so far as this contract was concerned.

The contract with Butler, if it be given any force at all, is simply a pledge for the payment of money. It does not constitute an absolute agreement for conveyance.

It is shown by the testimony, made part of the final proof, that this agreement became of no effect long prior to the date of the entry by the failure of Butler to furnish the money mentioned therein.

The final proof of Higgins shows a full and faithful compliance with the homestead law in the matters of settlement, residence and improvements. His conduct in connection with his claim to this land, which has been under consideration in one shape or another for seven years, has been such as to impress upon one familiar with the case the belief that he has acted all the while in good faith.

After carefully considering all the questions presented by the appeal in this case in the light of printed and oral arguments on both sides, I find no sufficient reason for disturbing the conclusion reached in your office.

The judgment accepting and approving Higgins' final proof is for the reasons herein given affirmed.

FINAL PROOF—PUBLICATION OF NOTICE.

MARION J. MICKLE.

The Department is without authority to permit a homesteader to submit final proof without publication of notice.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896.
(W. F. M.)

Marion J. Mickle has appealed from the decision of your office denying his petition to make final proof, without publication of notice, on his homestead entry of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 12, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 13, township 11 S., range 6 W., within the land district of Huntsville, Alabama.

It is not deemed necessary to state the grounds of his petition, since

however meritorious they may be, this Department is without authority to grant the relief, the statute requiring publication of notice of intention to make final proof in pre-emption and homestead entries being mandatory in its terms. 20 Stats., 472.

The decision appealed from is affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

BRILEY *v.* BEACH ET AL.

Under an application to perfect title under section 5, act of March 3, 1887, it is not material whether the purchase from the company was made before or after the passage of said act, if made in good faith and under the belief that the title of the company was good.

A settlement claim acquired with full knowledge of an adverse right, asserted under a purchase from a railroad company, will not defeat the right of purchase under said section.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (F. W. C.)

I have considered the appeals filed on behalf of Mary E. Beach and the Northern Pacific R. R. Co., from your office decision of March 14, 1894, holding for cancellation the selection by the Northern Pacific Railroad company of lots 1, 8, 9 and 16, Sec. 1, T. 16 N., R. 45 E., Walla Walla land district, Washington, and rejecting the application by Mary E. Beach to purchase said land under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556).

The tract is within the indemnity limits of the grant for said company and was included in its list of selections filed March 20, 1884.

August 26, 1887, Henry C. Briley tendered a declaratory statement for lot 1, of said section, which was rejected for conflict with the company's selection, and he appealed to your office.

On October 31 following, he tendered a second application alleging settlement August 17, 1887, of which notice was given the company and it filed objections thereto November 7, 1887.

February 11, 1888, Mary E. Beach filed an application to purchase the land first described, under the provisions of section 5 of the act of March 3, 1887 (*supra*), and gave notice of her intention to submit proof in support thereof. To this application the company also filed objections.

Hearing was held between Briley, Mrs. Beach and the railroad company, to determine their respective rights in the premises.

From the record made, it appears that one James A. Smith settled upon this land during the year 1875, and lived thereon, cultivating the land until 1877, when he sold his improvements and possessory claim to Thomas E. Fitch (the former husband of Mrs. Beach), who moved upon the land in 1883, and resided there until his death in 1885.

On April 25, 1883, he tendered a homestead application for the land involved, which was rejected by the local officers, who say, in this decision, that the records do not show whether an appeal from this rejection was taken or not.

Fitch left all his property to his wife, now Mrs. Beach, who continued to reside upon and improve the land, the improvements being valued at \$2,500.

From affidavits filed since the trial of the case, it appears that she applied to and contracted with the company for the purchase of this land in 1885, and completed her purchase on July 9, 1887.

This is objected to by Briley because at the trial she swore that she purchased of the company in July, 1887.

Both your office and the local office found that such a claim existed to the land at the date of the company's selection as would bar the same, but your office reversed the local office and held that Mrs. Beach could not purchase under the act of March 3, 1887, because she had purchased of the company after the passage of said act.

From a review of the matter I affirm your holding as against the company and its selection will be canceled.

In the matter of the purchase by Mrs. Beach from the company, the same appears to have been made in entire good faith, and if I deemed it material as to when the purchase was made, whether prior or subsequent to the passage of the act of March 3, 1887, would direct further hearing, but in view of the holding made in the case of *Andrus et al. v. Balch* (22 L. D., 238), the same is immaterial.

Briley's claim to lot No. 1, is based upon a settlement made August 17, 1887, and the local officers found that it was made with full knowledge of the existence of Mrs. Beach's claim. It was not therefore such a claim as would bar the right of purchase in Mrs. Beach. *Chicago, St. Paul, Minneapolis and Omaha Railway Co.* (11 L. D., 607); *Fulmele et. al. v. Union Colony* (16 L. D., 273).

I must, therefore, reverse your office decision denying the application to purchase made by Mrs. Beach, and she will be permitted to complete the same, and Briley's application will stand rejected.

DISPOSITION OF INDIAN LANDS—FIVE PER CENTUM FUND.

STATE OF SOUTH DAKOTA.

The payment to States of five per centum of the net proceeds of the sales of lands therein, formerly included in Indian reservations, authorized by section 2, act of March 3, 1857, is limited to the States in the Union at the date of said act.

Section 13, act of February 22, 1889, providing for the payment to the State of five per centum of the proceeds of the sales of public lands, contemplated a disposition of such lands for the benefit of the government, out of the proceeds of which said per centum might be paid, and it therefore follows that the State is not entitled to said per centum on lands disposed of under the general provisions

of section 21, act of March 2, 1889, as said disposals are for the sole purpose of creating a trust fund for the benefit of the Indians, in which the government has no interest save that of trustee; but the State is entitled to said per centum on homestead entries of said lands commuted under the amendatory act of March 3, 1891, as in such cases the entryman is required to pay the government price of the land in addition to the payments made for the benefit of the Indians.

The special appropriation made in the general deficiency act of March 2, 1889, for the benefit of certain States on account of their claims on the five per centum fund is not to be taken as authorizing the payment to such States of said per centum on sales of Indian lands for any period of time except the one specified in said act.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 13, 1896. (W. M. W.)

By your office letter of February 10, 1896, you transmitted applications numbered 1, 2, 3 and 4, of the State of South Dakota, making demand for the payment of five per centum of the estimated net proceeds of alleged sales of public lands in said State, and in view of the many legal questions presented in connection with these claims you submit them for consideration and such instructions relative thereto as may be deemed proper.

Application No. 1,

makes application and demand for five per cent of the net proceeds of sales of lands within the boundaries of what is known as the opened portion of the Great Sioux reservation in South Dakota, now known as Sioux lands. Also the Sisseton and Wapaheton reservation. Also the Yankton reservation.

No. 2 makes application for the payment of five per centum on the value estimated at \$1.25 per acre of all the land embraced in the following reservations:

Pine Ridge, Rosebud, Lower Brule, Crow Creek, Cheyenne River and Standing Rock—all in the State of South Dakota, except a small portion of Standing Rock reservation being in North Dakota.

No. 3 claims five per centum of the value of all lands in the "Sisseton and Wapaheton reservations, all in the State of South Dakota, retained permanently by said Indians."

No. 4 makes application for a like amount for all lands allotted to Indians in the Yankton Indian reservation.

These claims are made under the second section of the act of March 3, 1857 (11 Stat., 200), and under section 13 of the act of February 22, 1889 (25 Stat., 676-680), and are based upon the estimated value of all the land included in said reservations at \$1.25 per acre.

The act of March 3, 1857, required the Commissioner of the General Land Office to state an account between the United States and the State of Mississippi, for the purpose of ascertaining

what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the "Act to settle certain accounts between the United

States and the State of Alabama," approved the second March, eighteen hundred and fifty five; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay the said State five per centum thereon, as in case of other sales, estimating the lands at the value of one dollar and twenty five cents per acre.

Section 2 of said act required the Commissioner to

also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty five cents per acre.

Under said act an account was stated with each of the then existing public land States in which permanent Indian reservations were situated, and payments were made to said States on such account.

The several States admitted into the Union since March 3, 1857, have been provided for by grants in the respective acts admitting them to the Union, and no payments have been made under the act of March 3, 1857, to States admitted since that act was passed.

On the 14th day of September, 1886, your predecessor transmitted to the Department for instruction a claim made by the State of Kansas to five per cent of the proceeds of the sales of certain Indian lands in that State, basing its claim thereto on the act of March 3, 1857; and also the act of January 29, 1861 (12 Stat., 127), admitting Kansas into the Union.

On June 28, 1887, Secretary Lamar delivered an opinion on the claim, in which he discussed at length and with marked ability the acts of 1857 and 1861. He held that section 2 of the act of 1857 related only to the States in the Union at the time it was passed, and that it was not applicable to States subsequently admitted into the Union. (See 5 L. D., 712.) The authorities cited by Secretary Lamar and his reasoning respecting the inapplicability of the act of 1857 to States admitted into the Union since its passage seem to me conclusively sustain the correctness of the conclusion reached by him. I am abidingly satisfied that the act of 1857 is not in any sense applicable to the State of South Dakota.

For some reason Secretary Lamar, after the Kansas claim was denied by him, submitted the question to the Attorney General as to whether it should be allowed under the third section of the act of January 29, 1861 (12 Stat., 127), admitting Kansas into the Union; which section, in effect, was the same as section 13 of the act of February 22, 1889 (25 Stat., 676-680), under which these claims are made on behalf of South Dakota. The particular question submitted to the Attorney General was as follows:

At the time of the admission of Kansas there were large bodies of Indian lands within the jurisdiction of the State, although not within its political jurisdiction, that belonged to the Indians by original title and treaty stipulations, that after the admission of the State were ceded by the Indians to the United States for the pur-

pose of being sold, the proceeds to constitute a fund to belong to the Indians, and the question presented is whether the State of Kansas is entitled to five per cent of the sales of said lands.

On the 5th day of March, 1888, Attorney General Garland rendered his opinion on the question submitted, in which he concluded that:

The State of Kansas is not entitled to five per cent of the proceeds of the sales of the Indian lands . . . which the United States, in order to and as a consideration for the extinguishment of their title, contracted to receive, hold in trust, and pay to the Indians.

(Opinions Attorneys General, Vol. 19, 117.)

Section 13 of the act of February 22, 1869, *supra*, providing for the admission of South Dakota and other States, is as follows:

Sec. 13. That five per centum of the proceeds of the sales of public lands lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.

So far as the payment of the five per cent on sales of the public lands is concerned this is substantially the same provision that Congress has made for the several States, commencing with Ohio (Sec. 7, Act of April 30, 1802, 2 Stat., 175), and coming down through Illinois (3 Stat., 430), Iowa (5 Stat., 790), and Kansas (12 Stat., 127). As to the purpose for which this grant is made, it differs from most of the earlier statutes in that they were made for the purposes of making roads, canals, internal improvements, etc., while this is made for the support of common schools. The object, however, for which the grant is made is not material to the present inquiries.

The real questions to be determined in considering these claims are, what constitutes a sale of the lands that were included in the Sioux Indian reservation set apart by Article II of the treaty of February 24, 1869 (15 Stat., 635-636), and the Sisseton and Wahpeton Indian reservation by the third article of the treaty of February 19, 1867 (15 Stat., 506).

By the act of March 2, 1889 (25 Stat., 888), a portion of the Sioux reservation was divided into separate reservations, called Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule and Crow Creek reservations, and restored the lands in the Great Sioux reservation outside of these reservations to the public domain. Said act became effective upon the assent of the Indians thereto and by proclamation of the President, dated February 10, 1890 (26 Stat., 1554). Section 21 of said act provides that all the lands in the Great Sioux reservation, outside of the separate reservations described in the act above named,

Are hereby restored to the public domain and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law (except section two thousand three hundred and one thereof) and under the law

relating to townsites: *Provided*, That each settler, under and in accordance with the provisions of said homestead acts shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty five cents per acre for all lands disposed of within the first three years after the taking effect of this act, and the sum of seventy five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of. . . . That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said lands shall thereafter be part of the public domain of the United States, to be disposed of under the homestead laws of the United States, and the provisions of this act.

It is clear that Congress did not intend to restore these lands to the public domain by the use of the words, "are hereby restored to the public domain," as used in the forepart of section 21 of the act of 1889, in the ordinary sense of the terms. It only meant to restore them to the public domain in the sense that they might be disposed of by the United States in the manner and for the purpose pointed out by the terms of the act. The reason for this view is found further on in the same section, wherein it provides that all the lands opened to settlement, remaining undisposed of at the end of ten years from the taking effect of the act, shall be taken by the United States and paid for at fifty cents per acre, "and said lands shall thereafter be a part of the public domain of the United States, to be disposed of under the homestead laws of the United States and the provisions of this act." In other words, there are two restorations of these lands provided for, the first going only so far as to place the lands in a position to be disposed of at once by the United States in trust for the Indians; the other, to take effect at the end of ten years, after the government buys and pays for the land remaining undisposed of at the end of that time. When that time arrives, and the government pays for the remaining lands, then will such lands be "public lands" in the full sense of the term public lands, and the State will be entitled to five per cent of the proceeds arising therefrom, and not until then.

Section 22 of said act provides:

That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement of the United States for all necessary actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes hereinbefore provided.

The creation of the permanent fund thus referred to is provided for in section 17 of said act as follows:

There shall be set apart, out of any money in the Treasury not otherwise appropriated, the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which, at five per centum per annum, shall be

appropriated, under the direction of the Secretary of the Interior, to the use of the Indians receiving rations and annuities upon the reservations created by this act. . . . And at the end of fifty years from the passage of this act, said fund shall be expended for the purpose of promoting education, civilization, and self-support among said Indians, or otherwise distributed among them as Congress shall from time to time thereafter determine.

This act is in its character a law of the United States, and a compact or agreement with the Indians who were parties to it. They gave their assent to it as a prerequisite to it becoming a law. Without such consent the lands within the limits of these reservations would not have been subject to disposition by the United States. The fund created by these provisions was and is a permanent fund to be sacredly held in trust by the United States for the sole use and benefit of the Indians. The money constituting this fund does not belong in reality to the United States. It is the net proceeds of the sale of these Indian lands, theretofore reserved for their sole use and benefit. The government in its own right does not receive any part of the net proceeds of the sales of these lands. It only receives such proceeds in its character as a trustee for the Indians; the money so received is to be held and finally disposed of solely for the use of the Indians, as Congress may determine.

These provisions respecting this permanent fund are substantially the same as were contained in the treaty of December 29, 1865 (14 Stat., 687), with the Osage Indians, which, *inter alia*, was involved in the Kansas claim, *supra*, decided by Secretary Lamar and considered by Attorney-General Garland in his opinion heretofore referred to.

The act under consideration clearly creates a trust which covers the whole of the lands originally embraced in the Great Sioux and other reservations, referred to in the claims of South Dakota. The Department seems to have recognized the trust character thus created, for in the instructions issued under said act (10 L. D., 562-565), the local officers were directed:

To report filings and entries upon said lands in a separate, distinct, and consecutive series, and on separate abstracts, commencing with R. & R. No. 1, in each series, and report and account for the money received on account thereof in separate monthly and quarterly returns.

Evidently, the purpose of these instructions was to keep these trust funds separate and apart from funds derived from the ordinary sales of public lands in the Dakotas.

Section 21 of the act of 1889, *supra*, expressly excepted from its operation section 2301 of the Revised Statutes, which was the law under which commutations of homestead entries were allowed. The instructions under said act (10 L. D., 565) directed the local officers that entries made under the act of 1889 would not be subject to commutation under section 2301 of the Revised Statutes.

By the 6th section of the act of March 3, 1891 (26 Stat., 1095-1098),

section 2301 of the Revised Statutes was amended so as to read as follows:

Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months, and the provision of this section shall apply to lands on the ceded portion of the Sioux reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law.

This provision clearly recognizes the trust character of the payments originally required of entrymen of Sioux lands, and means that when such entrymen so elect, they may commute, after the time named, by paying the minimum price for the land, *in addition to the payments required under the act of 1889*. In cases of commutation under this section, it seems clear that the money paid thereon should be paid into the Treasury of the United States, free of any trust character, the same as money received from the ordinary sales of public lands. It follows that the money paid on commuted entries on the ceded portions of the Sioux Reservation should be treated as the proceeds of sales of public lands, and, therefore, the State of South Dakota is entitled to five per centum of the proceeds of such money after deducting all the expenses incident to the same, as provided by section 13 of the act of 1889, *supra*, and you are directed to state and certify an account of the proceeds of such sales in favor of said State.

The claim to five per cent of the money received on commuted entries is not specifically made in any of the applications now under consideration, but it was made in oral argument at the hearing accorded the State on these claims, and hence such claim has been considered in all respects the same as if it had been specified in the applications.

Aside from the foregoing, the principal question presented and urged is, whether the State of South Dakota is entitled, under section 13 of the act admitting her into the Union, to five per cent on all the lands within the Great Sioux and Sisseton and Wahpeton reservations which have been disposed of to settlers under the homestead laws, estimating said lands at \$1.25 per acre. If in such cases the claim of the State is denied, it follows *a fortiori* that the other claims now made by said State should be denied. In what is known as the five per cent cases, *Iowa v. McFarland* and *Illinois v. the same*, which was decided by the supreme court in 1884 (110 U. S., 471), the words: "Net proceeds of sales of all public lands" in the Iowa case, and "net proceeds of the lands . . . sold by Congress" in the Illinois case, were used. In this case the words used are: "The proceeds of the sales of public lands . . . sold by the United States."

In those cases the question was, whether under the five per cent clauses in the Iowa and Illinois acts said States were entitled to the

per centage on the value of lands not sold by the United States for cash, but disposed of by the United States in satisfaction of military land warrants. The court in construing the acts, says (p. 482):

When each of these acts speaks of lands [sold by Congress] five per cent of the net proceeds of which shall be reserved, and be "disbursed" or "appropriated" for the benefit of the State in which the land lies, it evidently has in view sales in the ordinary sense, from which the United States receive proceeds, in the shape of money payable into the treasury, out of which the five per cent may be reserved and paid to the State; and does not intend to include lands promised and granted by the United States as a reward for military service, for which nothing is received into the treasury. The question depends upon the terms in which the compact between the United States and each State is expressed, and not upon any supposed equity extending those terms to cases not fairly embraced within their meaning.

The interpretation placed by the court on the five per cent clauses of the acts, that the word "sales" means sales in the ordinary sense as applied to the sales of public lands for *cash*, money payable into the treasury *out of which* the five per cent may be paid, seems to me to be the only fair and proper construction to be placed on such acts, including section 13 of the Dakota act.

Every reason given by the court for denying the claims of the States of Iowa and Illinois for the five per cent on the lands disposed of for military land warrants will apply in denying the claims of South Dakota on lands within the Indian reservations named in said State's applications, for in the disposition of such lands the United States only receive the money in trust for the Indians after the expenses are paid. No part of said money could properly be used in paying the five per cent if it were to be paid. All of the net proceeds is to be kept in the Treasury for the sole use and benefit of the Indians.

In view of the fact that these claims are made on behalf of a sovereign State of the Union, I have given them a painstaking and careful examination in the light of the several treaties, statutes, the decision of Secretary Lamar on a similar question, the opinion of Attorney General Garland rendered thereon, and the decision of the supreme court in the five per cent cases, and I am abidingly satisfied that the claims made by South Dakota can not lawfully be allowed, save and except as to commuted entries hereinbefore referred to.

In the general deficiency appropriation bill of March 2, 1889 (25 Stat., 905-921), Congress appropriated to the State of Kansas \$43,790.32; to the State of Colorado \$16,000.00; and to the State of Nebraska \$35,500.00, on account of five per centum fund arising from the sale of public lands in said States from July 1, 1884, to June 30, 1885. Referring to these appropriations and the decision of Secretary Lamar, *supra*, your office letter says:

Those several appropriations appear to have been construed as authorizing the payment to these States of five per cent on the net proceeds of the sale of Indian lands, and notwithstanding the departmental decision above referred to, accounts have accordingly been stated in favor of the State of Kansas, as aforesaid, and with the State of Nebraska for sale of the Pawnee Indian lands, and with the State of Colorado for the sale of Ute Indian lands to June 30, 1895.

Said appropriations were made in the general deficiency bill for a single year specifically named, and the language used does not in terms, nor by implication, warrant the construction placed upon it by your office. It falls far short of authorizing the payment to said States of five per cent of the proceeds of the sales of Indian lands in them for any other year or period of time except the year specified in the act.

You are, therefore, directed to discontinue the statements of accounts for five per cent of the sale of Indian lands, in favor of any and all of said States. And you are further directed to decline to state or certify accounts for any of the claims of South Dakota presented in these applications, except the five per cent on commuted entries hereinbefore directed to be made.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

YOCOM *v.* KEYSTONE LUMBER COMPANY.

Lands within the common granted limits of the Chicago, St. Paul, Minneapolis and Omaha Railway, and Wisconsin Central Railroad, restored to the public domain on the adjustment of the former grant, and under the ruling then followed that said lands were excepted from the latter grant by the indemnity withdrawal on behalf of the Omaha company, and sold as a part of the grant to said company prior to said adjustment, may be purchased from the government under section 5, act of March 3, 1887, the right of the Central company having been forfeited by the act of September 29, 1890.

The right of purchase under said section is not defeated by an adverse settlement made after the passage of said act.

The right of purchase under section 5, act of March 3, 1887, is not repealed by the act of March 2, 1889.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (F. W. C.)

I have considered the appeal by B. F. Yocom from your office decision of November 9, 1892, dismissing his protest against the acceptance of the proof tendered by the Keystone Lumber Company upon its application made under the act of March 3, 1887 (24 Stat., 556), to purchase lots 1, 2 and 3, Sec. 31, T. 57 N., R. 6 W., Ashland land district, Wisconsin.

The tract is within the ten miles granted limits common to the grants made by the act of May 5, 1864, to aid in the construction of the Bay-field branch of the Chicago, St. Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad.

Within this common limit a moiety of the lands was granted on account of each road, but under the rulings prevailing prior to the decision of the supreme court in the case of the Wisconsin Central railroad company *v.* Forsyth (159 U. S., 46), the Wisconsin Central R. R. company was precluded from claiming its moiety because the land had been reserved as indemnity for the Omaha company, under the grant of June 3, 1856.

This was the ruling of this Department at the time of the adjustment

of the Omaha grant and as the land here in question was not allotted to the Omaha company in settlement of its claim within the common limits of the two grants, it was, with other lands, restored.

The record made in the case now before me shows that in January, 1887, the Omaha company sold this tract, with other lands, to the Superior Lumber company; that said lumber company sold to Payne, Cochran and Company, and John E. Debois on August 29, 1889, and that they conveyed it to the Keystone Lumber Company the applicant to purchase under the act of 1887.

Under the decision of the court referred to it was error to hold that the indemnity withdrawal for the Omaha company under the grant of 1856, defeated the grant under the act of 1864, for the Central company, so that had the Central company completed its road opposite this land it would have been held to have inured on account of said grant.

The Central company failed to build opposite this land and its grant opposite unconstructed road was forfeited by the general forfeiture act of September 29, 1890.

It is apparent from what has been said that within the common ten miles granted limits, the Omaha and Central companies were each entitled to a moiety of the land.

The Central company failing to earn its moiety left the Omaha company tenant in common with the United States, and it was necessary that the Omaha company should select a quantity of land within the common limit equal to one-half the common area to which it would receive full title.

Prior to this adjustment, the Omaha company had listed all the lands in the conflict and the purchase made by the Superior Lumber company was prior to the adjustment under which this land was selected for restoration.

It was opposite the constructed road of the Omaha company, from which the Superior Lumber company purchased, and as the Central company failed to earn it, and, under the act of forfeiture, it has been restored to the United States, I am of the opinion that the facts relative to the Central grant can be eliminated, in the consideration of the applicant's right of purchase under the act of 1887.

Yocom alleges settlement upon the land on September 10, 1890, but as this is subsequent to the passage of the act of March 3, 1887, no such rights were acquired thereby as would defeat the right of purchase under the act of March 3, 1887. *Chicago, St. Paul, Minneapolis and Omaha R. R. Co., 11 L. D., 607, and Union Colony Co. v. Fulmele, 16 L. D., 273.*

It is urged that the right of purchase under the 5th section of the act of 1887 is repealed by the act of March 2, 1889, but a similar contention was considered and overruled in the case of *Swineford et al. v. Piper, 19 L. D. 9.*

The remaining questions raised by the protest are disposed of in

departmental decision in the case of *Telford v. Keystone Lumber Company* (19 L. D., 141).

From a careful consideration of the entire matter I affirm your office decision dismissing Yocom's protest and the Keystone Lumber Company will be allowed to complete its purchase of the tracts herein involved.

HOOK v. PRESTON ET AL.

Motion for review of departmental decision of November 2, 1895, 21 L. D., 374, denied by Secretary Smith May 14, 1896.

RAILROAD GRANT—RELINQUISHMENT—LIEU SELECTIONS.

THE GULF AND SHIP ISLAND R. R. CO. v. THE UNITED STATES.

The Gulf and Ship Island R. R. Co. by accepting the provisions of section 7, act of September 29, 1890, and executing the relinquishment required thereunder, did not by such action forfeit its right to indemnity for lands relinquished prior thereto under the act of June 22, 1874.

The relinquishment of the company executed under section 7, act of September 29, 1890, covered earned lands of the company not included in the relinquishment of 1884, on which filings and entries had been allowed after said relinquishment; and for the lands so relinquished under the act of 1890 the company is entitled to select other lands, in lieu thereof, from the odd or even sections within the indemnity limits of the road actually constructed.

For the lands relinquished under the act of 1874, the company is entitled to select lieu lands from the odd or even sections anywhere within the primary or indemnity limits of the unforfeited portion of the grant.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (G. B. G.)

The case of the Gulf and Ship Island Railroad Company v. the United States, is before the Department on appeal from your office decision of April 21, 1894, rejecting indemnity lists of said road Nos. 3 and 5, for the reason—

The company is not entitled to make elections under the act of 1874 for lands relinquished under the act of September 29, 1890.

The company must confine its selections (under section 7 of the act of 1890) to the even sections in indemnity limits.

Your office decision, rejecting said lists, was predicated upon and governed by the departmental decision of March 3, 1893 (16 L. D., 237), and the argument of counsel on appeal in the case at bar, is addressed to securing a reconsideration and reversal of that decision.

The contention of the company is not that it is entitled to make selections under the act of 1874 for lands relinquished under the act of September 29, 1890, but that it maintains its right of selection under the act of 1874 for lands relinquished under that act.

Of the two pending lists of indemnity selections from the odd sections for lands relinquished by the company, list No. 3 is for 917.78 acres in the indemnity limits under both the act of 1874, and section 7 of the act of 1890, and list No. 5 is for 11,362 acres in the granted limits under the act of 1874 alone. Both lists appear to be for lands along the line of constructed road, and it is admitted that the company has sustained the loss designated as the basis of the selections made.

By the act of August 11, 1856 (11 Stat., 30), there was granted to the State of Mississippi, to aid in the construction of certain railroads, "every alternate section of land designated by even numbers for six sections in width on each side of each of said roads" with the right to take indemnity from the lands of the United States nearest the tiers of sections above specified in alternate sections or parts of sections within fifteen miles from the line of road, the lands granted to be disposed of only as the work progressed, and to be subject to the disposal of the legislature of the State for the purpose specified and for no other.

Section 4 of said act is as follows:

And be it further enacted, That the lands hereby granted to the said State, shall be disposed of by said State only in the manner following, that is to say; that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior, that any continuous twenty miles of either of said roads is completed, then another like quantity of land hereby granted not exceeding one hundred and twenty sections for such road may be sold, and so on from time to time, until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

The State accepted the grant by the act of February 2, 1857, and by act of December 3, 1858, conferred upon the Gulf and Ship Island Railroad Company that part of the grant pertaining to the line from Brandon to the Gulf of Mexico.

A map of definite location of the road in question was filed and accepted on December 3, 1860, but no work was done on said road other than establishing said line of definite location until after the year 1882, when the lands granted were by the terms of the granting act subject to forfeiture.

Section 1 of the forfeiture act of September 29, 1890 (26 Stat., 496), contains the following provision—

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and contiguous with the portion of any such railroad not now completed, and in operation for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

Only twenty miles of the road had been completed at the date when the forfeiture became effective.

The contention of the company has been that, having been authorized

under the provisions of section 4 of the granting act to sell the granted lands along twenty miles of its line after definite location and prior to construction of any part of its road, and upon the completion of twenty miles of road to sell the lands along an additional twenty miles, it is entitled under the grant, and by virtue of its having built twenty miles, to the granted lands along forty miles of its line as definitely located, notwithstanding the forfeiture of 1890, especially as it had mortgaged said lands, which, under the laws of Mississippi, was equivalent to a sale; that having thus been sold, the lands do not fall within the purview of the forfeiture act.

This contention of the company has been sustained by the Department in departmental decision of December 20, 1894 (19 L. D., 534), reversing in that regard the aforesaid departmental decision of March 3, 1893.

There was, however, reserved for the future consideration of the Department, the question of the right of said company to make selections of lieu lands in both the odd and even numbered sections of its grant.

There are two questions raised by the appeal and motion for review.

First. Has the company the right to make selections under the act of 1874, in view of the terms of section 7 of the act of 1890?

Second. Has the company the right of selection in the odd sections under section 7 of the act of 1890?

The act of June 22, 1874, (18 Stat., 194), entitled "An act for the relief of settlers on railroad lands" is in part as follows:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States, subsequent to the time at which, by decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered, or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral, and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes.

The lands designated as the basis of the pending lists came within the scope of this act, and on June 24, 1884, the company relinquished the same in favor of settlers, reserving, however, to the State and the company such right of indemnity as they were entitled to under the act of August 11, 1856, and the act of June 22, 1874, from any public lands within the limits of the grant.

That by virtue of this relinquishment the company was entitled to select its lieu lands in the alternate odd sections of both the granted and indemnity limits has been settled by the Department in the case

of the Southern Pacific R. R. Co. (18 L. D., 275) where it was held (syllabus):

The act of June 22, 1874, intended to confer upon railroad companies the right to select any unappropriated, non-mineral lands within the limits of their grants that were subject to entry and disposal under the general land laws at the date of selection, in exchange for lands relinquished under the provisions of said act.

Before this selection was completed, however, Congress passed the act of September 29, 1890, section one of which forfeited all unearned railroad lands, and by its other sections provided relief for certain settlers and railroad companies. Section 7 deals with the Gulf and Ship Island Railroad Company, and, after confirming all *bona fide* entries and claims made prior to or on January 1, 1890, it proceeds thus:

And on condition that the Gulf and Ship Island Railroad Company within ninety days from the passage of this act shall, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title and claim in and to all such lands as have been sold, entered or claimed, as aforesaid, then the forfeiture declared in the first section of this act shall not apply to, or in any wise affect so much and such parts of said grants of lands to the State of Mississippi as lie south of a line drawn east and west through the point where the Gulf and Ship Island Railroad may cross the New Orleans and Northeastern Railroad in said State, until one year after the passage of this act. And there may be selected and certified to, or in behalf of said company, lands in lieu of those hereinbefore required to be surrendered to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

On December 11, 1890, the company filed the acceptance and relinquishment aforesaid, which after reciting the said section 7 in full, proceeds as follows:

The Gulf and Ship Island Railroad Company does hereby accept the provisions of said section VII and does hereby relinquish and release to the United States all said company's interest, right, title, and claim in and to all lands within the limits of its grant as had been prior to the approval of said act sold by the officers of the United States for cash, or entered in good faith under the pre-emption and homestead laws with the allowance of said officers; also all lands on which there were any bona fide pre-emption and homestead claims on the 1st day of January, 1890, arising or asserted by actual occupation of the land under color of the laws of the United States.

I am of opinion that the railroad company by accepting the provisions of said section 7 of said act, and executing the relinquishment required thereunder, did not forfeit its right to indemnity under the act of 1874.

For such lands as had been relinquished to the United States under the act of 1874 the company had acquired a vested right of selection, and subsequent legislation could not operate upon such right. Were it plain that Congress intended by the act of 1890 to forfeit such right a question of constitutional limitation on the power of that body would arise over which this Department would have no jurisdiction, but it is a familiar rule of statutory construction that the legislative power will

not be presumed to have intended that which it did not have authority to do.

There is no conflict between the act of 1874, and section 7 of the act of 1890. Congress by the act of 1874 provided for the selection of lands in lieu of those *earned* by the several companies, while by section 7 of the act of 1890, Congress was legislating solely about unearned lands which had just been forfeited by section 1 of that act to take effect one year from the date thereof, if the road had not been built within that time.

This being true, I do not understand why the right of indemnity selection under section 7 of the act of 1890 need be confused with the right of selection already acquired under the act of 1874.

The indemnity provided for under the act of 1890 was a separate and independent right contingent upon the building of the road within one year from the passage of the act.

Said road was not built within the time allowed by section 7, nor has it been built since that time. It appearing, therefore, that no part of said road has ever been built except the first twenty miles; then section 1, of the act aforesaid, operated as a forfeiture one year from the date thereof, of all the lands granted opposite the unconstructed portion, because they were unearned lands, except the additional twenty miles which had been mortgaged and for the purposes of this opinion must be treated as earned lands.

The company occupies an anomalous position affecting its rights under the act of 1890. As has been said, Congress, in that act, was legislating as to unearned lands. The act does not in terms forfeit earned lands and it will not be presumed that Congress so intended. The company did not comply with the conditions of the saving clause in section 7 of that act and it follows that it is not entitled to any benefit conferred thereby. But it is clear, to my mind, that the company is entitled to select lands in lieu of those relinquished under that act, not by virtue of the act but by virtue of the relinquishment thereunder.

The company's relinquishment under the act of 1874 (*supra*) was intended to embrace, and perhaps did embrace, all of the earned lands of the road claimed by pre-emption and homestead settlers under the public land laws on June 24, 1884, the date thereof. It could not be presumed, therefore, that the company relinquished these same lands under the act of 1890. It did not have them to relinquish. The United States had already been re-invested with title.

But subsequent to the relinquishment of 1884, and prior to the passage of the act of 1890, certain other pre-emption and homestead filings had been allowed for other earned lands of the company, and these are the lands relinquished under the act of 1890, and for these lands I think the company is entitled to indemnity, or more specifically, for other lands in lieu thereof.

If the company had not relinquished these last named lands under

the act of 1890, it might at any time before the adjustment of its grant have relinquished these same lands under the act of 1874, and would be entitled to lieu lands therefor as for those originally relinquished under said last named act. But inasmuch as it did relinquish them under the act of 1890, it to that extent waived its right to selection under the act of 1874, and must now select its lieu lands for those last relinquished, as provided by the act of 1890.

The question now follows—Where may these lands be selected?

The language of the act is,

to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

There can be no question that this language confines selections to the indemnity limits and opposite constructed road, and I think the language broad enough to cover both odd and even sections within such limits, but I am of opinion that these selections should be confined to the indemnity limits of the road *actually* constructed.

The language here quoted is very different from that found in the act of 1874 (*supra*). By the last named act the selections might be made of any "public lands . . . within the limits of the grant," while the language here is, lands "opposite such part of the line as may be constructed at the date of selection."

The language of the granting act saved the basis of the selection to the company not only in the lands opposite road actually constructed but also in lands twenty miles in advance of construction, but selection of lieu lands under the acts of 1874 and 1890 must be governed by the language of these acts respectively.

The company will therefore be permitted to take lands in lieu of those relinquished under the act of 1874, anywhere within the limits of the first forty miles of its grant, either in the granted or indemnity limits, and either even or odd sections, or both, which were non-mineral, and unappropriated at the date of the selection; but its right to select lands in lieu of those relinquished under the act of 1890 will be confined to the indemnity limits of the first twenty miles of road.

You will prepare a list of selections in conformity with this opinion and forward the same for my approval.

SWAIN *v.* KEARNEY.

Motion for review of departmental decision of March 13, 1896, 22 L. D., 306, denied by Secretary Smith, May 14, 1896.

PRACTICE—NOTICE—SERVICE BY PUBLICATION.

WAGERS v. NELSON.*

An affidavit as the basis of an order for publication may be made by any one possessing the requisite information.

An allegation in the affidavit furnished as the basis of an order of publication that inquiry for the defendant's whereabouts has been made in the locality of the contested claim, and at the "last known address" of the defendant, may be accepted as sufficient in that respect, though that address is not the one shown by the record, in view of the fact that the place of publication and hearing is at said record address and no appearance is made in response to the notice.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (C. J. W.)

April 2, 1889, Mary Nelson made timber culture entry No. 13,930, NW. $\frac{1}{4}$, Sec. 17, T. 7 N., R. 50 W., at Denver, Colorado, giving her address at Sterling, Colorado.

May 3, 1893, J. William Wagers filed affidavit of contest against said entry, alleging total failure of claimant to break, plant, or cultivate any portion of said land to trees, tree seeds or cuttings, or to crops, or to cause the same to be done, since date of entry, and summons issued requiring the parties to appear on 22d of July thereafter, to respond and furnish testimony.

On June 12, 1893, W. F. Tritsch, claiming to act as agent for contestant, filed affidavit alleging the non-residence of defendant and prayed that service of notice by publication be ordered, which was accordingly done.

On July 22, the hearing was had before the register and receiver, the defendant making default. On the testimony produced by contestant, the local officers found for contestant and recommended the cancellation of said entry.

On February 20, 1894, your office found that the affidavit of Tritsch, on which the order for service of notice by publication was predicated, was defective, and that defendant had not been legally served and the case was remanded with instructions to allow contestant further time to perfect service of notice, or to appeal.

On April 14, 1894, contestant filed his appeal from said decision.

Was the defendant served?

Rule of Practice 11. provides:

Notice may be given by publication alone, only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service can not be made. The party will be required to state what effort has been made to get personal service.

The following is the affidavit filed in response to this rule.

W. F. Tritsch, being duly sworn, on his oath says, That he is the duly authorized agent of the plaintiff in the above action and has the general management thereof

* Not reported in Vol. XXI.

in connection with E. E. Armour, the attorney for the plaintiff. That the plaintiff resides in Nebraska a long distance from the land office and is not familiar with the facts hereinafter set out, whereas the same are particularly within the knowledge of the affiant. And for this reason he makes this affidavit instead of the plaintiff. That the claimant is a non-resident of Colorado and out of the State, as affiant is informed and believes, so that personal service of notice cannot be had. Affiant has caused general inquiry to be made in the locality of the contested claim and also at Leroy, Colorado, the claimant's last known address, to learn his whereabouts, for the purpose of serving him personally with notice of this contest, but has not been able to learn anything of him. Affiant believes that it is not reasonably possible by ordinary means to serve the claimant personally with notice of the hearing in the above cause, nor to find his whereabouts. Wherefore he prays that service of notice by publication be ordered herein.

Rule 11 seems to contemplate some evidence in addition to the affidavit, alleging non-residence, before an order will be granted allowing service by publication, when required by the register and receiver. In this case no such requirement was made by them, they being satisfied with the statements contained in the affidavit. And the Department sees no reason for overruling their conclusion in this respect.

The rule literally construed would seem to require that this affidavit should be made by the contestant himself, but in the case of *Bradford v. Aleshire* (15 L. D., 238), it was held that this affidavit can be made by any person who possesses the requisite information, and this, I think, is a reasonable and just interpretation of the rule as to this point. Your office held the affidavit of Tritsch in the case under consideration to be insufficient. Looking to the affidavit I find that it alleges:

1. Claimant's non-residence;
2. That her whereabouts and address is unknown;
3. That by ordinary means it is not possible to make personal service of the notice upon her.
4. That he has had general inquiry made both in the neighborhood of the claim and at Leroy, Colorado, her last known address, but has been unable to find out her whereabouts;
5. That he has been informed and believes that she is out of the state.

It seems to me that this is a substantial compliance with the requirements of Rule 11. The affiant uses the pronouns "he" and "him", instead of "she" and "her", which your office treats as evidence of the ignorance of affiant as to claimant's sex and as amounting to a serious defect in the affidavit. Such verbal inaccuracy is immaterial and does not affect the sufficiency of the affidavit.

It is said, however, that the record shows her address to have been Sterling, Colorado, at the time of her entry. The reply to this is that the sworn statement of Tristch in his affidavit that Leroy, Colorado, was her last known address, overcomes the legal presumption of her continued residence at Sterling, notwithstanding she may have given no notice of her change of address, and especially since it appears that Sterling is the location of the land office at which the hearing occurred, and the place of publication of the newspaper in which the notice of contest was published, and she made no appearance.

The evidence fully supports the charge in affidavit of contest as to default in breaking the second five acres, as required by law, from date of entry to present time, or causing the same to be done.

Your office decision is accordingly reversed and timber-culture entry No. 13,930, canceled.

GARTLAND *v.* MARSH ET AL.

Motion for review of departmental decision of February 10, 1896, 22 L. D., 163, denied by Secretary Smith, May 14, 1896.

RAILROAD GRANT—INDIAN RESERVATION—INDIAN COUNTRY.

WARREN *v.* NORTHERN PACIFIC R. R. CO.

Land embraced at the date of the Northern Pacific grant in an Indian reservation created by treaty is excepted from the operation of the grant, though at definite location such land has been relieved from the reservation subject only to the right of Indian occupancy; and the provisions in section 2, of said grant with respect to the extinction of Indian title are not applicable to land that acquires the status of Indian country after the date of the grant, but is included in a technical reservation prior thereto.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (F. W. C.)

I have considered the appeal by Annie M. Warren, from your office decision of March 8, 1892, holding for cancellation her homestead entry covering the NE. $\frac{1}{4}$, Sec. 29, T. 43 N., R. 27 W., Taylor's Falls land district, Minnesota, for conflict with the grant for the Northern Pacific railroad company.

The land in question is within the twenty miles primary limits of the grant for said company, as adjusted to the line of definite location shown upon the map filed November 20, 1871. It is also included within the reservation created under the treaty of February 22, 1855 (10 Stat., 1165), with the Chippewa Indians.

By the terms of the second article of said treaty it was provided—

And at such time or times as the President may deem it advisable for the interest and welfare of said Indians, or any of them, he shall cause the said reservations, or such portion or portions thereof, as may be necessary, to be surveyed; and assign to each head of a family, or single person over twenty-one years of age, a reasonable quantity of land, in one body, not to exceed eighty acres in any case, for his or their separate use; and he may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them respectively; said tracts to be exempt from taxation, levy, sale, or forfeiture; and not to be aliened or leased for a longer period than two years, at one time, until otherwise provided by the legislature of the State in which they may be situate, with the assent of Congress. They shall not be sold, or alienated, in fee, for

a period of five years after the date of the patents; and not then without the assent of the President of the United States being first obtained. Prior to the issue of the patents, the President shall make such rules and regulations as he may deem necessary and expedient, respecting the disposition of any of said tracts in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons; and should any of the Indians to whom tracts may be assigned thereafter abandon them, the President may make such rules and regulations, in relation to such abandoned tracts, as in his judgment may be necessary and proper.

Thus evidencing, as stated in the opening recitation of said article, a reservation "for the permanent homes of said Indians." The reservations created under the treaty of 1855 were reduced by the treaties of March 11, 1863, proclaimed March 19, 1863 (12 Stat., 1249), and that of May 7, 1864, proclaimed March 20, 1865 (13 Stat., 693), each of which ceded part of the lands formerly reserved to the United States. In each of said treaties it was declared not to be obligatory upon the Indians to remove to the new reservation until the United States had complied with certain stipulations, and in each there was a special provision in regard to the Mille Lac Indians (a band of the Chippewas), in the following words:

Provided, that owing to the heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not in any way interfere with, or in any way molest, the persons or property of the whites.

As to the lands ceded after the treaties with the Indians had been proclaimed, it would seem that the effect of the provision just referred to was to leave these ceded lands in the nature of Indian country, as it was before the conclusion of the treaty of 1855 with these Indians by which a technical reservation was established.

The question of the effect of the reservation created under the treaty of 1855 upon the grant for the Northern Pacific Railroad Company, has before been the subject of consideration by this Department in the case of Northern Pacific R. R. Co. *et al.* v. Walters *et al.* (13 L. D., 230), but the discussion in said case was limited to the effect of said reservation upon the company's right to make selection of such lands under its indemnity provisions. The effect of the reservation created under the treaty of 1855, upon the grant for said company has not before been considered by this Department. I understand from inquiry at your office that the present case was made a test case for the determination thereof. This being so, it is to be regretted that the company has not filed an argument in answer to the appeal, filed in behalf of Warren, from your office decision holding that these lands inured to the company under its grant because they were freed of the reservation prior to the definite location of the company's road.

It is understood that the land in question is a part of that ceded by the treaty concluded May 7, 1864, but as said treaty's ratification was advised, with an amendment by the Senate, February 14, 1865, and proclaimed by the President March 20, 1865, it must be held that this

land was in a state of reservation under the treaty of 1855, at the date of the passage of the act of July 2, 1864 (13 Stat., 365), under which the company claims this grant.

The question for determination, therefore is: Was such a reservation sufficient to except the lands covered thereby from the operation of the grant for said company?

In the case of *Bardon v. Northern Pacific railroad company* (145 U. S., 535), it was held, referring to the grant of 1864, that said grant "is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws."

In the case of *Dellone v. Northern Pacific Railroad Co.* (16 L. D., 229), it was held that lands embraced—at the date of definite location of the road—within a technical Indian reservation established under the provisions of a treaty do not form a part of the "Indian country" to which the provisions contained in section two, of the grant of 1864, for extinguishing the Indian title, are applicable, but are reserved from the operation of said grant under the express terms of the third section thereof.

The land under consideration in that case was a part of the Crow Indian reservation established after the date of the passage of the act making the grant for said company, and which had not been released from reservation at the date of the filing of the company's map of definite location opposite thereto.

In view of the decision of the court, however, in the *Bardon* case, just referred to, it would seem that the reasoning and argument made in the *Dellone* case would apply with equal force to the case now under consideration, for it must be clear that these lands reserved under the treaty of 1855 were not public lands at the date of the passage of the act of 1864, nor were they a part of the Indian country with relation to which the second section of the act making this grant provided for the speedy extinguishment of the Indian title.

After the treaty of 1864 had been proclaimed on March 20, 1865, as before stated, the Indians were permitted, under said treaty, to remain upon the land so long as they should not in any manner interfere with, or in any way molest, the persons or property of the whites, which, as before stated, reduced the previous existing condition, so far as the ceded lands were concerned, from a technical reservation to lands incumbered with the right of Indian occupancy; but this being subsequently to the passage of the act making the grant, I am of the opinion that it was not within the contemplation of the second section of the act requiring the extinguishment of the Indian title, which refers only to such lands as were then embraced in what was known as the territory of the Indians, and not those tracts which were embraced in defined and technical reservations. Such reservations established in accordance with treaty stipulations, were, to my mind, as free from the operation of the grant as reservations established for any other purpose.

I must therefore reverse your office decision, and hold that the land in question is excepted from the operation of the grant for said company, and that the entry by Annie M. Warren be permitted to stand, unless some other and sufficient reason exists for the cancellation thereof.

WILLIS v. MERRITT.

Motion for review of departmental decision of February 4, 1896, 22 L. D., 79, denied by Secretary Smith May 14, 1896.

PRE-EMPTION FINAL PROOF—APPLICATION TO ENTER.

ALGER v. WOOD.

The reservation effected by notice of application to make pre-emption final proof is for the benefit of the pre-emptor, and does not operate as a segregation of the land, as between third parties whose claims arise independently of the pre-emptor.

An application to enter, improperly held to await prior proceedings involving the land, when allowed, will relate back to the time when it was received with the proper fees, and cut off intervening adverse claims.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (W. M. W.)

I have considered the case of John E. Alger v. Eliza L. Wood, on the appeal of the latter from your office decision of December 13, 1894, holding for cancellation her homestead entry for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 21, T. 13 S., R. 64 W., Pueblo, Colorado, land district.

In order to clearly understand the material questions in the case it appears to be necessary to refer to matters antedating the entry of Wood and the filing of the contest affidavit of Alger against said entry.

On the 17th day of January, 1889, one Peet Harness filed a pre-emption declaratory statement covering, *inter alia*, the land in controversy, alleging settlement November 22, 1888. On November 25, 1889, he submitted final proof, against the allowance of which William S. Henderson and Arthur J. Sanford protested, and later on said parties contested Harness' claim. A hearing was had, and the local officers decided against the contestants.

Contestants appealed.

On March 29, 1892, your office held for cancellation Harness' declaratory statement as to one forty acres included in said declaratory statement, which forty is not involved in this controversy. While the matter was pending Harness died, and an administrator of his estate was appointed.

On May 22, 1893, your office canceled the claim of Harness to said forty acres, and, at the same time, allowed F. B. Ross, administrator of the estate of Peet Harness, sixty days in which to make payment for and entry of the balance of the land included in Harness' declaratory statement.

On June 3, 1893, all parties in interest were notified of your office decision of May 22, 1893.

On July 31, 1893, the homestead application of Eliza L. Wood, to enter the land in controversy under the homestead law, was received at the local office, with a remittance of \$12.00 to pay the fees and commissions for such entry; and on the same day the local officers "suspended" "said homestead application to await the expiration of the time allowed F. B. Ross, administrator, in which to make payment for and entry of the remaining portion of the tract of land on which final proof had been offered by Peet Harness." At the same time Wood was informed by the local office that the fees and commissions for a homestead entry of one hundred and twenty acres amounted to \$14.50, instead of the \$12.00 remitted by her, which was returned to her by receiver's check. On August 8, 1893, \$14.50 to pay fees and commissions of her homestead entry was received by the local officers from Mrs. Wood. On August 16, 1893, the local officers reported to your office that the time allowed Ross, administrator, to pay for and to enter the land, had expired and no action had been taken by him.

On August 25, 1893, a letter of inquiry was received by the local officers from Mrs. Wood, relating to the \$14.50 she had remitted to pay fees and commissions under her homestead application.

On August 25, 1893, Mrs. Wood was notified by the local officers of the action taken by our office letter of July 31, 1893; that the said administrator had failed to take any action in the premises, and the matter had been reported to the Commissioner, from whom this office was awaiting further instructions.

On the 28th day of August, 1893, Mrs. Wood forwarded to the local officers

an order of the court to the administrator and a relinquishment of the tract by the said F. B. Ross, as administrator of the estate of Peet Harness, deceased, with the request that the original or copies of the papers so transmitted be returned to her.

On September 5, 1893, the local officers returned the original papers to Mrs. Wood without action, for the reason that their "office not having facilities to furnish copies of the papers referred to." Said officers further report:

That on December 18, 1893, the said relinquishment of F. B. Ross, administrator of the estate of Peet Harness, deceased, was again filed in this office, and Pre. D. S. No. 14,940 was canceled upon the records.

On December 23, 1893, Mrs. Wood's entry for the land in controversy was placed of record in the local office.

On December 29, 1893, John E. Alger filed an affidavit of contest against Wood's entry, alleging, in substance, that he made actual settle-

ment on the land in question on the 28th day of October, 1893, and that he resided continuously thereon until the filing of the affidavit:

4. That said land was restored to the public domain December 18, 1893, by the filing of the relinquishment of F. B. Ross, administrator of the estate of Peet Harness, deceased, and that on said December 18, 1893, affiant was an actual *bona fide* resident upon said land, in undisputed and exclusive possession thereof. 5. That said homestead entry of Eliza L. Wood was not made in good faith for her own exclusive use and benefit, but was made for the use and benefit of her son Charles Wood.

A hearing was ordered and had before the local officers, at which the parties appeared and introduced testimony.

On July 5, 1894, the register and receiver found that Wood's homestead application was made in good faith and followed up to the best of her ability.

That the relinquishment of F. B. Ross, administrator, should have been placed of record when forwarded to this office with Eliza L. Wood's letter of August 28, 1893, instead of being returned without action, as was done by office letter of September 5, 1893.

They recommended that Alger's contest be dismissed.

Alger appealed to your office.

On December 13, 1894, your office reversed the finding of the local officers, and held Wood's entry for cancellation.

Wood appeals.

The evidence taken at the hearing shows without conflict that Alger settled on the tract on the 28th day of October, 1893, and built a small house and established an actual residence on the tract within a few days thereafter.

The evidence on the part of the contestant utterly fails to sustain the charge in the affidavit of contest that Mrs. Wood's entry was not made in good faith for her own use and benefit. On the contrary, her good faith is abundantly shown.

The appellant assigns errors in your office decision:

1. In holding that the land in question was not subject to entry until the relinquishment of Ross, administrator, was placed of record in the local office.

2. In not holding that the relinquishment in question should have been retained and placed of record, and Mrs. Wood's entry allowed when the said relinquishment was first sent to the local office, August 28, 1893, in accordance with the 1st section of the act of Congress approved May 14, 1880.

3. In not deciding that the contestee by virtue of her action in being the first applicant in point of time and commencement of proceedings for the acquisition of title and by regularly following up these proceedings had acquired the superior right to the land.

* * * * *

5. In not holding that the contestee was protected by law, and that she should not be allowed to suffer from the errors and omissions of the local officers.

Your office, in support of the conclusion reached in the decision appealed from, cites *Holmes v. Hockett*, 14 L. D., 127; *Mills v. Daley*, 17 L. D., 345; and *Ady v. Boyle*, 17 L. D., 529.

These cases have been uniformly followed by the Department up to the present time. See *Smith v. Malone*, 18 L. D., 482; *Fister v. Boyer*, 19 L. D., 178; *Selig et al. v. Cushing*, 20 L. D., 57; *Mulligan v. Stalter*, Id., 225. These cases hold that an application to enter, in order to be valid, must be made at a time when the land sought to be entered is free from appropriation and legally subject to entry.

The questions arising on the record in this case are: Were the lands involved, at the time Mrs. Wood's application was made, free from appropriation? And, were they legally subject to entry? If so, then the authorities cited in support of your office decision are not applicable to the case at bar, and should have nothing to do with the determination of the case. In my judgment, both of these questions should be answered in the affirmative.

At the time Mrs. Wood's application to enter was made the land embraced therein was government land. Harness had been adjudged to have the better right to it as against Henderson and Sanford who contested his pre-emption filing; Harness' final proof had been found satisfactory, but he took no steps to complete his right to the land by making payment for it, which was a prerequisite in order to make entry of the land under the pre-emption law. After his death his administrator was given sixty days by your office in which to make payment and entry of the land. This order could not be construed as reserving, or withdrawing the land from disposition under the homestead law, to the first legal applicant, for there is no authority in law for withdrawing or reserving public land in such manner or for such a purpose. It will be remembered that Harness' administrator is not asserting any claim adverse to Mrs. Wood in this matter. This controversy is between strangers to the record in the Harness claim.

A pre-emption filing does not constitute an appropriation of the land reserved thereby. The appropriation or disposition of the land included in such filing only takes place and becomes effective after final proof is made and accepted and the purchase money paid to the proper government officer. See *Frisbie v. Whitney*, 9 Wallace, 187; *The Yosemite Valley case*, 15 Wallace, 77; 17 Opinions Attorneys-General, 160; *United States v. Johnson et al.*, 5 L. D. 442.

A pre-emption filing is no bar to a subsequent filing, or entry of the land covered by such filing, by another person. *Milam v. Favrow*, 1 L. D., 435; *Olson v. Larson et al.*, 4 L. D., 403-404; *Iddings v. Burns*, 8 L. D., 224; *Waller v. Davis*, 9 L. D., 262.

While this is true, it has been held by the Department that published notice of an application to make pre-emption cash entry so far reserves the land covered by such application as to prevent its being properly entered by another, pending consideration of said application and final action thereon. *L. J. Capps*, 8 L. D., 406; *Smith v. Brearly*, 9 L. D., 175; *Creasy v. Hamilton*, 16 L. D., 520; Id., on review, 18 L. D., 128.

Moreover, in this case the equivalent of final action had been taken

respecting this pre-emption claim, when Mrs. Wood applied to enter, as the time in which to make payment by the administrator had expired.

This limited reservation is made more as an administrative matter than as a matter strictly founded on the letter of the law. It is made solely for the individual benefit and protection of the person who made the pre-emption filing, and who has given notice of making his final proof. As between third parties, whose claims arise independently and in no manner growing out of the pre-emption claim or connected therewith, as in the case at bar, it cannot be held to segregate the land so as to take it out of the power of the Land Department to dispose of it to the first legal applicant. In other words, Harness, or his administrator, was the only party who could have properly claimed the benefits of this reservation. Certainly, Alger could base no such a claim upon it as would operate to defeat Wood's right under her homestead application.

Mrs. Wood's application to enter this land was received by the local officers on the 31st day of July, 1893, the amount remitted by her for fees and commissions was not enough by \$2.50; upon being advised of this fact, she forwarded to the local officers the proper amount (\$14.50), which was received by the local officers on the 8th day of August, 1893, and retained by them. It was the duty of the local officers upon the receipt of this money to have allowed her entry as of that date. The fact that they did not act on her application should in no manner operate to prejudice or defeat her right.

It has been held that the failure of the local officers to act promptly on a relinquishment will not prejudice the rights of a subsequent applicant for the land. *Yates v. Glafcke*, 10 L. D., 673; *Roberts v. Gaston et al.*, 11 L. D., 592; *Anna B. Krider*, 15 L. D., 21.

I see no reason why this principle should not apply with the same force to the failure of the local officers to act upon an application to enter, as well as to a relinquishment of an entry. It may be said that the register and receiver did act on Mrs. Wood's application by suspending it. The local officers were without authority under the law to "suspend" the application. It was their duty, as before stated, to act on said application by either accepting or rejecting it. If the register and receiver had rejected her application, it would have been their duty to notify her of their action and of her right to appeal before she would have been called upon to take further steps in order to protect her rights.

When the local officers did act upon Wood's application, they accepted it and thereby cured or condoned their prior neglect to do so. Her application initiated a right under the homestead law that related back upon its acceptance to the time it was received by the local officers and the required amount of fees and commissions paid to them, and cut off all intervening adverse claims. *Rice v. Lenzshek*, 13 L. D., 154.

The application of Mrs. Wood to enter the land in question should have been allowed long before Alger's settlement (October 28, 1893), and while pending it withdrew the land from other disposition. Alger

could not, and did not, acquire any right by his settlement at the time he made it, any more than he would if the land had been covered by an actual entry made prior to such settlement. See *Pfaff v. Williams et al.*, 4 L. D., 455; *Hughey v. Dougherty*, 9 L. D., 29; *Richards v. McKenzie* (on review), 13 L. D., 71; *Goodale v. Olney* (on review), 13 L. D., 498; *McMichael v. Murphy et al.* (on review), 20 L. D., 535.

Alger's contest is accordingly dismissed, and your office decision is reversed.

APPLICATION TO ENTER—NOTICE OF REJECTION.

WILSON v. CALKINS ET AL.

Failure to appeal from the rejection of an application to enter does not defeat the right of the applicant, if he is not given the requisite notice in writing of the adverse action and of his right of appeal therefrom.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896. (W. A. E.)

Ira Calkins, by Copp and Luckett, his attorneys, has filed motion for review of departmental decision of May 16, 1895 (unreported), in the case of John Wilson v. Ira Calkins and Edward A. Ross, involving the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, T. 49 N., R. 9 W., Ashland, Wisconsin, land district.

This land is a portion of that forfeited and restored to the public domain by act of Congress approved September 29, 1890 (26 Stat., 496), and was opened to entry on February 23, 1891.

At 9 o'clock A. M., on the latter named day, the soldiers' declaratory statements of Ira Calkins for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 29; and of Edward A. Ross for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, of the same section, were received by mail at the local office and placed of record.

About an hour later, on the same day, the homestead application of John Wilson for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of said section, was received by mail and rejected for conflict with the soldiers' declaratory statements of Calkins and Ross.

Wilson did not appeal from this rejection, but on March 17, 1891, he filed affidavit of contest against the soldier's declaratory statement of Calkins, and on May 1, 1891, he also filed affidavit of contest against the soldier's declaratory statement of Ross, alleging in each instance prior settlement.

On July 13, 1891, Calkins, and on August 11, 1891, Ross, filed homestead applications, respectively, for the land covered by their declaratory statements, and these applications were suspended to await final action on the contests of Wilson and one Jonas Wickstrom (also an applicant for a portion of the land covered by said declaratory statements).

After various orders by the local office and your office, a hearing was finally had on November 14, 1892.

The testimony taken at that time shows that in May, 1890, Wilson made settlement on the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section by laying the foundation of a house, clearing some land, and planting potatoes; that in July, 1890, he built a house on the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the section, moved into it, and continued to live on the land up to the date of the opening, except for short absences (part of which was due to an accidental wound).

January 13, 1893, the register and receiver found in favor of Wilson, and this action was affirmed by your office on July 28, 1893.

Ross did not appeal from your office decision, but Calkins did, and it is the decision of the Department affirming the action of your office that is now under review.

Section 2 of the act of September 29, 1890, gives to bona fide settlers on said forfeited lands at the date of the passage of the act a preference right of entry for a period of six months.

Wilson was a settler in good faith on this land at the date of the passage of said act, and consequently had a settler's preference right of entry. The chief question in the case, then, is, whether he protected his settlement rights.

The principal points presented for consideration by this motion are:

1. That Wilson's homestead affidavit, filed with his application of February 23, 1891, was illegal and void, having been executed before a deputy clerk at a point far distant from the clerk's office, a deputy clerk having no authority to administer oaths in such cases under the laws of Wisconsin.

2. That even if such application were valid, yet Wilson lost whatever rights he might have had thereunder by his failure to appeal from its rejection.

3. That Wilson's contest against the soldiers' declaratory statements of Calkins and Ross availed him nothing, as contest will not lie against a soldier's declaratory statement. The case of *Lachapelle v. Herbert* (18 L. D., 494), from the same land district and similar in many particulars to the present case, is cited in support of this last proposition.

The record shows that Wilson's homestead affidavit, filed with his application on February 23, 1891, was sworn to before "C. H. Noyes, Clerk of the Court for Bayfield Co., Wis." After a careful examination of all the testimony and exhibits in the case, I am unable to find one word of evidence in support of the statement that said affidavit was executed before a deputy clerk at a point far distant from the clerk's office, and consequently there is no need to consider the cases cited by counsel as to the illegality of a homestead affidavit so executed. Wilson's application was *prima facie* valid and there is nothing in the record to impeach its validity.

Did he lose what rights he might have had under said application by his failure to appeal from its rejection?

There is nothing in the record to show that this application was ever formally rejected or that Wilson was ever notified of its rejection and his right of appeal. The only notation on said application is the date of receipt. The local attorney for Wilson, N. B. Wharton, says in his answer to the appeal of Calkins and Ross from the decision of the register and receiver:

Plaintiff's application to enter the land, filed February 23, 1891, was erroneously rejected by the register and receiver and he was not advised at that time that he had a right to appeal from said rejection to the Commissioner of the General Land Office, but on the other hand he was advised that he had thirty days in which to ask for a hearing. He took the latter course and applied for a hearing to determine his rights in the matter.

In the case of *Owens v. Gauger* (18 L. D., 6), it was held that failure to appeal from the rejection of an application to enter does not defeat the right of the applicant, where he is not given the requisite notice in writing of the adverse action and of his right of appeal therefrom.

The fact, then, that Wilson followed the erroneous advice of the local officers and filed affidavits of contest against the declaratory statements of Calkins and Ross, instead of appealing from the rejection of his application to enter, cannot defeat his rights under his application, as he was never properly notified of the rejection of said application and of his right of appeal.

This view of the case renders it unnecessary to consider the effect of a contest against a soldier's declaratory statement.

The motion for review is denied.

MILLE LAC INDIAN LANDS—PRE-EMPTION CLAIM.

SMITH *v.* LOCHREN.

A pre-emption filing for Mille Lac lands, authorized by the rulings in force at the time of its allowance, is within the spirit and intent of the second proviso to section 6, act of January 14, 1889, and is accordingly protected thereby, if subsisting at the date of said act.

Under a filing of such character, however, wherein the right to make final proof is suspended by the provisions of the act of July 4, 1884, it is incumbent upon the pre-emptor, during such period of suspension, to maintain his possessory right by such acts as will negative an inference of abandonment, where the rights of an intervening adverse claimant are involved.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896. (C. J. W.)

On January 9, 1884, James Lochren made declaratory statement filing No. 1966, for SE. $\frac{1}{4}$ SW $\frac{1}{4}$, W. $\frac{1}{2}$ SE $\frac{1}{4}$ and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 18, T. 42 N., R. 25 W., 4th p. m., Minnesota, alleging settlement December 10, 1883.

On February 9, 1891, Frank M. Smith filed homestead entry No. 3970, which conflicted with Lochren's filing as to the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$.

On November 3, 1891, Nils J. Johnson filed homestead entry No.

4094, which included the remainder of Lochren's filing not covered by Smith's entry. Lochren gave notice of his intention to make final proof April 23, 1891, on which date Smith protested against said final proof on the ground that Lochren's pre-emption had expired.

A hearing was thereupon had, and, on December 29, 1893, the local officers rendered their decision rejecting Lochren's claim. From this decision Lochren appealed to your office upon various grounds in said appeal specified, and on November 8th, 1894, your office considered said case and reached the same general conclusion as that arrived at by the local officers, although based on a different line of reasoning.

On January 5, 1895, Lochren filed his appeal from your office decision, in which is specified various errors of law. It is alleged (1) that your office erred in holding that the act of July 4, 1884, was simply declaratory of a pre-existing right in the Indians and that the lands were in a state of reservation and not subject to entry or disposal prior to the passage of that act, and (2) that it was error to hold that the land in question was not subject to disposal at the time of Lochren's filing; (3) that it was error to hold that the act of January 14, 1889, annulled all rights under pre-emption filings within the limits of the Mille Lac reservation; (4) that it was error to hold that the proviso to the act of January 14, 1889, does not save rights acquired under a preemption filing and applies only to cases where final proof had been previously made; (5) in holding that no entry of said lands could be made except between the dates specified in the joint resolution approved December 19, 1893; (6) in holding that the attempt of Lochren to make entry and proof in 1891, was not equivalent to an entry in the meaning of the resolution; (7) error in holding that the proviso in the act of July 4, 1884 (23 Stat., 89), applied to the land in controversy.

The last named contention will be first disposed of, since, if the said proviso does not apply, the case will be greatly simplified.

The contention of appellant is that the language of the proviso refers to land in an entirely different locality. This question, however, is not an open one here. In the case of Robert Lowe (5 L. D., 541), this proviso was construed and that construction leaves the land in question with the body of land intended to be affected by the act. The effect of this legislation upon Lochren's filing is quite another question. The filing was made prior to the date of the act which only undertook to suspend and arrest all further proceedings to acquire title to any of these lands until further legislation should be had, and this further legislation was had when the act of January 14, 1889 (25 Stat., 642-645), became operative.

The act of July 4, 1884, was the result of a doubt, as to whether the lands covered by the various treaties with the Mille Lac Indians could, under said treaties, be regarded as a part of the public domain and open to settlement. Its purpose seems to have been to arrest all further attempts at settlement upon them, until this doubt was removed. The

treaties of March 11, 1863 (12 Stat., 1249), and of May 7, 1864 (13 Stat., 695) were those under which the title of the government was acquired and each of said treaties contained this provision: that, owing to the heretofore "good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with, or in any manner molest, the persons or property of the whites."

This treaty stipulation, therefore, was of force when Lochren's filing was allowed and if it was a void filing it must have been for this reason. It seems, however, from the before cited act of January 14, 1889, that while Congress recognized the existence of an unextinguished interest in the lands remaining in the Indians under these treaties, it also recognized the existence of valid pre-emption and homestead entries made while this interest survived.

So it seems to me that Lochren's filing cannot properly be held void because of these treaty stipulations, but having been allowed by the government, is to be treated as valid. The real question then as to the validity of this filing is: Does it come within the proviso of said act of January 14, 1889, which provides—

That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

Lochren's filing was allowed, and it seems to have been authorized by the decisions of force at the time of its allowance.

In a technical sense, a pre-emption filing is not an entry, but I am of the opinion that a valid pre-emption filing comes within the spirit and meaning of said proviso, if subsisting at the date of the act.

Lochren had then a valid pre-emption filing of record prior to and at the date of the passage of the act of July 4, 1884.

The proof, I think, shows that he maintained residence upon the land and continued to make improvements upon it from January, 1884, to August, 1884, which would have entitled him to submit final proof and obtain final certificate but for the passage of said act of July 4, 1884. This act having suspended his right to make final proof, or payment, the question arises, what were his legal obligations as to continued residence upon the land during the period of suspension?

In the case of *Hudson v. Docking* (4 L. D., 333), it was held that meager observance of the requirements of the pre-emption law pending a prolonged suspension of the township plat would be excused, where good faith was shown in the maintenance of possession during such period.

In case of *Albert H. Hooper ex parte* (12 L. D., 633) it was held that after due compliance with the law as to five years' residence and cultivation, his subsequent temporary absence would not affect his rights. It would seem, therefore, that one occupying the status which Lochren

did towards this land, would be bound to do enough towards the perpetuation and protection of his possession to negative the inference of the abandonment of his claim, where the rights of an intervenor are in question. He seems to have made occasional repairs and tried to keep up his settlement until May, 1887, at which time he visited it and found his house so wrecked that he says of it: "The condition in which I found my house, completely discouraged me from making any further attempts to keep my house in repair until the land should be again opened for settlement." From that time until he returned to it February 16, 1891, it was permitted to decay and present the appearance of an abandoned claim and it was during this time and seven days before Lochren's return and re-occupancy, that Smith made his entry for a part of the land covered by Lochren's filing. As between Smith and Lochren, as to that part of the land claimed by Smith, Lochren must be held to have abandoned it. He proceeded, however, to rebuild his house (the exact location of which is not disclosed by the record) and to re-open his clearing, and afterwards, and while he was so in possession, Johnson made his homestead entry for the remainder of the land not covered by Smith's entry.

Johnson, as far as the record discloses, made his entry after Lochren had cured or was engaged in curing his default, and while Lochren's filing was still intact, and he thereby acquired no right except as subject to Lochren's prior rights. Johnson, it seems, did not protest against Lochren's final proof. It is directed that a hearing be had and that Johnson be required to show cause why his homestead entry No. 4094 should not be canceled and Lochren be allowed to perfect his final proof for the land covered by it.

Your office decision is accordingly so modified.

HOMESTEAD CONTEST—NOTICE—CONTESTANT.

MARSH *v.* HUGHES.

The fact that the claimant is residing on the land at the time when the notice of contest is legally served, will not defeat a contest charging abandonment, if it appears that the claimant's action in returning to the land is induced by actual knowledge of the impending suit, with no previous intent to comply with the law in good faith.

A tenant at will of a homesteader is not, by reason of such relation to the entryman, precluded from contesting his entry.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (C. W. P.)

I have considered the case of Wilbert H. Marsh against Francis Hughes, as presented by the appeal of the former from the decision of your office of January 23, 1895, dismissing his contest of the latter's homestead entry, No. 3370, made April 18, 1892, of the NW. $\frac{1}{4}$ of Sec. 34, T. 9 N., R. 4 E., Oklahoma land district, Oklahoma Territory.

The record shows that said Marsh filed his affidavit of contest against said entry on April 8, 1893, charging abandonment, change of residence and failure to settle on and cultivate the land entered; that on October 18, 1893, a notice of hearing was issued by the local officers, but was not served by the contestant; that another notice was issued on November 27, 1893, for a hearing on January 16, 1894; that service of said notice was made on December 17, 1893, which was Sunday and on that account was set aside by the local officers, and notice issued for a hearing on February 26, 1894, at which time the parties appeared and a hearing was duly had. The local officers held that the entryman had cured his laches prior to the service of the notice of contest, and hence the allegations of the contestant that the claimant had abandoned his claim or failed to establish his residence thereon was not true at the time of service of notice, and they dismissed the contest.

The contestant appealed; and your office affirmed the judgment of the local officers; but upon the ground that the contestant being tenant at will of the entryman, "could not be heard to charge his landlord with abandonment of the land." The contestant has appealed to the Department.

Without reviewing the evidence in detail, it is sufficient to say that I agree with your office decision that it shows an entire lack of good faith on the part of the entryman and fully supports the allegations of contest.

But it is contended on the part of the entryman that his failure to comply with the law (if it exist) was cured prior to the service of notice; and this plea was accepted by the local officers.

It is well settled, that compliance with the law, after affidavit of contest is filed and before notice of contest is issued, will cure a prior default and defeat the contest. But

evidence of compliance with the law after the filing of the affidavit and before the service of legal notice, should be considered with reference to the question whether the claimant *in fact* had or had not knowledge of the filing of the contest, and in the former event, whether his subsequent compliance with the law was because of such knowledge and with a view of defeating the contest, and with no previous intent to comply with the law in good faith, or was uninfluenced by such knowledge and *bona fide* in pursuance of an original purpose to fulfil the law. In the former case, the evidence would be entitled to little or no weight, and in the latter, to as much as if no affidavit had been filed. The fact of compliance with the law after affidavit and before legal notice, merely goes to the weight and not the admissibility of the testimony, . . . and good faith is always an important, if not a controlling element. *Scott v. King*, 9 L. D., 299. And see *Ashwell v. Honey*, 13 L. D., 121 and cases cited.

In the case at bar, while the evidence shows that the entryman was residing on the land, when the notice of contest was served upon him on January 16, 1894, it is admitted by the entryman that the postmaster at Krebs, Indian Territory, about the latter part of October, 1893, offered to serve notice of the contest on him, and that he refused to

accept service, saying, "that is all right, let the government settle it." And you say in your office decision, that considering the entryman's absence from the land for nearly fourteen months, his refusal to permit service upon him of the notice, and the fact that he has made no additional improvement and has done no work on the land since his return to it, leads you to the conclusion "that his laches were cured because of his knowledge of the pending contest." I concur in this opinion and think that the entryman has not shown a *bona fide* intent to cure his default.

But, after deciding that the charges in the affidavit of contest are supported by the evidence, your office dismissed the contest on the ground that the contestant was tenant at will of the entryman and consequently could not initiate a contest. For this you cite no authority and none can be found.

Admitting that the contestant was tenant at will of the entryman, which is disputed, that would not prevent him from bringing a contest against the entry. It has been repeatedly held by the Department that any person may contest a homestead entry. In *Mitchell v. Salen*, 16 L. D., 403, it was held that a minor was not disqualified as a contestant, and in *Spitz v. Rodey*, 17 L. D., 503, that an alien was competent to initiate a contest.

For these reasons, your office decision is reversed and you are directed to cause said entry to be canceled.

ACCOUNTS—SECTION 8, ACT OF JULY 31, 1894.

GILBERT M. WARD.

By the provisions of section 8, act of July 31, 1894, the acceptance of payment, under settlement of an account by an auditor without the suspension of any item therein, precludes the revision of the same.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896. (W. M. B.)

I have considered the appeal by Gilbert M. Ward from your office decisions of January 30, and March 27, 1895, wherein the two accounts presented by the said Ward, the one for surveys executed by him in T. 13 N., R. 6 W., the other for surveys T. 21 N., R. 9 W., State of Washington, under contract No. 341, executed June 10, 1890, aggregating \$1,942.38, were adjusted and reduced by your office to the sum of \$1,644.84 and so audited and certified for payment by the Auditor for the Department of the Interior; draft being issued for said amount of \$1,644.84 on March 12, 1895, in favor of Ward, by the Treasury Department; it appearing that the same was paid on the 25th of said month and year.

Respecting the accounts as presented and adjusted the following is a correct statement:

Accounts, as presented, for surveys in—

T. 13 N., R. 6 W	\$1, 082. 83	
T. 21 N., R. 9 W	859. 55	
		\$1, 942. 38

Accounts, as adjusted, for surveys in—

T. 13 N., R. 6 W	1, 082. 83	
T. 21 N., R. 9 W	562. 01	
		1, 644. 84

Balance claimed by deputy	297. 54
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In adjusting these accounts the reduction of \$297.54 made in the one for surveys in T. 21 N., R. 9 W., which is now claimed by the contracting deputy, was made without changing or suspending any item of mileage in the lines run and marked by the deputy, the said reduction being made by allowing the mileage claimed by the deputy, but disallowing the maximum rate charged for the subdivisinal lines in T. 21 N., R. 9 W., and allowing in lieu thereof for said lines the minimum rates. Such adjustment, it appears, was made upon a classification of the said lines in accordance with the intrinsic evidence furnished by the field notes sworn to and returned by deputy Ward.

Germain to the question of further consideration or revision of these accounts—which have been audited and settled in full, as audited, without suspending any item in the accounts submitted—is the inhibitory provision of the act of July 31, 1894 (28 Stat., 208, Sec. 8, par. 3), in words following:

Any person accepting payment under a settlement by an auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted: but nothing in this act shall prevent an auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.

Appellant having accepted payment upon the settlement made, and said settlement having been made, as stated above, without the suspension of any item in the said accounts, appellant cannot obtain a *revision* of the same, and the action of your office in adjusting these accounts is therefore hereby affirmed.

The disposition of this matter under provision of the act of July 31, 1894, as herein expressed, makes it unnecessary to consider or pass upon the question raised in the appeal with respect to the character of land over which the lines of survey passed.

HOMESTEAD—CHANGE OF ENTRY—INTERVENING RIGHT.

CAWOOD *v.* DUMAS.

The right to a change of entry from one tract to another cannot be allowed in the presence of an intervening adverse right, even though the applicant may have been the prior settler on the tract thus applied for.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (G. C. R.)

The case of Leander C. Cawood *v.* Mathes Dumas, involving the latter's homestead entry, made September 28, 1891, for the NE. $\frac{1}{4}$ (not SW. $\frac{1}{4}$, as you have it,) of Sec. 22, T. 15 N., R. 1 E., Guthrie, Oklahoma, is before me on the appeal of Dumas from your office decision of January 10, 1895, holding his entry for cancellation and allowing Cawood to amend his entry so as to include said tract.

On September 25, 1891, Leander C. Cawood made homestead entry for the NE. $\frac{1}{4}$ of Sec. 15 (not Sec. 16), T. 15 N., R. 1 E., same district; this tract lies one mile north of the tract subsequently entered by Dumas, and Cawood applied to amend his entry for the tract last described to that embraced in the entry made by Dumas.

On October 12, 1891, Cawood filed his application in the local office to amend his entry in the particular above described, alleging that he had settled on the tract on the afternoon of April 22, 1891 (day of opening), with the intention of making the same his home, etc. The register and receiver recommended that a hearing be ordered. Your office, on July 30, 1892, found that Cawood

satisfactorily shows that a mistake was made through no fault of his in attempting to describe the land claimed by virtue of settlement, made September 22, 1891. As Mr. Dumas does not allege prior settlement in his homestead entry, you will call upon him to show cause within thirty days why his entry No. 8203 (describing the land), made September 28, 1891, should not be canceled and Mr. Cawood allowed to amend his entry No. 7949 to said tract.

In pursuance of said instructions a hearing was had; the issue upon which evidence was taken was as to which of the two, Dumas or Cawood, first settled upon the land. Both swore that they settled on the land on the afternoon of April 22, 1891; that each proceeded with all possible haste to the land from a point about three and a half miles west of the same; that although each was over nearly all parts of the land that afternoon, and each made settlement and improvements capable of being readily observed, yet neither one saw the other; both of them introduced witnesses, substantially corroborating their statements, and none of the witnesses on either side knew of any settlement or saw any improvements, except those made by the one for whom they respectively testified. Dumas and his witnesses are quite certain that no one settled on the land that afternoon except Dumas himself;

and Cawood and his witnesses give like testimony as to Cawood's sole proprietorship.

Dumas, aged sixty-four years, and somewhat handicapped with luggage, went from the border line, the full distance of nearly four miles, to the land on foot; while Cawood traveled about the same distance in a wagon drawn by horses. Since each is alleged to have started at the same time, the local officers found that Cawood, with his team, traveled faster than Dumas on foot, and consequently reached the land first, and was thus the prior settler.

Upon this finding the register and receiver recommended that Cawood be permitted to amend his entry to cover the tract, and that Dumas's entry thereof be canceled. The decision appealed from sustained that finding, and from it deduces the conclusion that Cawood should be allowed to amend his entry.

Both Dumas and Cawood appear to have resided on the land to date of hearing. Assuming that the facts are correctly given by your office and the local office, do these facts justify the judgment appealed from? I think not.

Section 2372 of the Revised Statutes provides that in case of an entry of a tract of land not intended to be entered, the purchaser of the land or his legal representative may upon proper showing, supported by corroborating testimony, be allowed to make entry of the tract originally intended to be taken; but in all such cases it must be shown by the testimony of the applicant himself, "with such additional evidence as can be procured," how the mistake occurred, and that every reasonable precaution and exertion had been used to avoid the error, and this showing must be satisfactory to your office; and if the tract be then "unsold," the change may be made, and "if sold, to any other tract liable to entry," but in no case "shall anything herein contained affect the right of third persons."

In case of a bona fide mistake made by one exercising ordinary care and prudence, and in the absence of an intervening adverse right, the land intended to be secured by the claimant may be substituted for the tract mistakenly filed upon or entered. *Cowen v. Asher*, 6 L. D., 785; *A. J. Slootskey*, *idem*, 505.

In the case of *Noyes v. Beebe*, 16 L. D., 313, it was held that a change of entry from one tract to another

can not be allowed when the lands desired have been filed upon or entered by another party before the application to change is made. It is only in the absence of intervening adverse rights that the lands intended to be taken may be substituted for those mistakenly filed upon or entered.

When on September 28, 1891, Dumas entered the land, the records not only showed the same subject to entry, but they also showed that Cawood had entered another tract three days before. Cawood may have preceded Dumas to the land and settled first, but he did not follow up his settlement with an entry, but entered another tract. He

may have made an honest mistake when he afterwards went to make entry, but unfortunately it was his own mistake, and he alone must suffer the consequences. Neither the statute quoted nor the decisions of this Department will permit him to amend his entry, when to do so, the land in question would be taken from another whose entry was subsequently made, and that, too, when the records showed the applicant had entered another and different tract.

The decision appealed from is reversed. Dumas's entry will remain intact, subject to compliance with law.

FRED G. WAGNER.

Motion for review of departmental decision of December 28, 1895, 21 L. D., 556, denied by Secretary Smith, May 14, 1896.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

GASPER ET AL. v. ST. LOUIS RIVER WATER POWER CO.

The purchase by a corporation of railroad lands to which the title fails brings such corporation within the remedial provisions of section 5, act of March 3, 1887.

The provisions of said section were intended to protect those who had purchased lands under a belief that the title under the railroad grant was good, and are alike applicable to lands within the primary and indemnity limits.

The second proviso in said section applies only to lands, which at the date of the act had been settled upon after December 1, 1882, by persons claiming in good faith, in ignorance of the rights or equities of others.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896. (A. E.)

The record in this cause shows that on February 13, 1891, the St. Louis River Water Power Company applied to make entry of lots 1, 2, 3, and 4, of Sec. 7, T. 48, R. 15 W., Ashland, Wisconsin, under the 5th section of the act of March 3, 1887, and gave due notice of its intention to submit proof on March 30, 1891, in support of its application. On the day appointed proof was submitted by the company, and William Ray Durfee, Charles Gasper and Richard Latta appeared and protested against the allowance of the company's application.

The local office, however, approved the proof submitted and recommended that the applicant be allowed to purchase and receive patent. From this Gasper and Latta appealed.

On February 13, 1893, your office considering this appeal affirmed the action of the local office, and decided that the company should be allowed to make entry of said tracts. From this the protestant Latta appealed to this Department.

The record shows that the land involved in this controversy lies outside of the ten mile limits of the grant to what afterwards became the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, but within the limits of the fifteen mile indemnity withdrawal. That on August 15, 1884, the same was purchased by Jay Cooke, of Philadelphia, Pennsylvania, from said railroad company. That by deed, dated February 20, 1890, said Cooke conveyed to said St. Louis Water Power Company the land in controversy. The proof made by the Water Power Company disclosed the fact that said Cooke made said purchase for said company, and not in his own individual behalf.

In assigning errors the appellant contends that your office erred in holding that a corporation is a person qualified to purchase under said act of March 3, 1887; in concluding that surplus indemnity lands are or can be excepted from the operation of the grant; in concluding that one who enters upon lands as a settler subsequent to March 3, 1887, and prior to the application to purchase under section 5 of said act, is not protected by the second proviso of said section 5; in holding that the settlers had no standing before the Department, and in not holding that the land is subject to settlement and entry at the time the protestants went upon the same.

It has long been established both in this country and in England that a remedial statute will be so construed that those who are within the mischief shall be considered entitled to the remedy, though not mentioned in the law. In other words, that the remedy of a statute must by construction be extended to all that appear by the conditions to be aggrieved.

In the case under consideration it is admitted that the purchase from the railroad company by Jay Cooke was in reality the purchase by the corporation. The purchase by this corporation of these lands sold to it through Cooke by the railroad company as part of the latter's grant places the Water Power Company within the mischief contemplated by the 5th section of the act of 1887; hence, it is entitled to the remedy given by the act, without regard to whether it be expressly named in said act or not. See *Telford et al. v. Keystone Lumber Company*, on review (19 L. D., 141).

The fifth section of the act of March 3, 1887, being remedial in its character, was intended to protect those who had purchased lands under a belief that the vendor had good title to the same. It has been held by this Department that the statute referred to related to any and all lands, whether within the primary or indemnity limits, which the railroad company had sold, representing them to be part of its grant.

The second proviso in section 5 act of March 3, 1887, applies only to the case of lands, which at the date of the passage of the act had been settled upon after December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws, in ignorance of the rights or equities of others in the premises. (11 L. D., 607.)

As the said protestant did not settle upon the land prior to March 3, 1887, he is not protected by the proviso and is entitled to no consideration by reason thereof.

In view of what has heretofore been said, your office decree in this case is affirmed, and the applicant will be allowed to make the purchase.

SOLDIERS' HOMESTEAD—RESIDENCE—EQUITABLE ACTION.

JAMES P. ROOT.

A soldier's homestead entry made in good faith without the requisite period of residence, and in the hands of a bona fide transferee, may be equitably confirmed, where it appears that the entryman was never definitely notified as to the true character of the defect in his entry, and failed to secure such information after due inquiry.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (J. A.)

The land involved herein is the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 7, T. 9 N., R. 2 W., M. D. M., Marysville, California, land district.

July 13, 1891, James P. Root made homestead entry for said tract under Sec. 2305 R. S., accompanying his application with a certificate from the Adjutant General of California, showing military service in the army from November 4, 1864, to April 13, 1866. The register wrote the following words across the face of the homestead application: "Claims settlement Sept. 1890. Act 8 June, 1872. Service 2 years 5 mos. 14 days."

April 4, 1893, Root made final proof showing residence on the land for two years, six months, and twenty-eight days. It will be observed that the entryman's military service was for a period of one year five months, and nine days, and that his term of residence and military service combined amount to only four years and seven days, instead of five years, the required period. The local officers, however, issued final certificate to him under their erroneous calculation as to the term of his military service.

Your office on February 13, 1894, advised the local officers, stating the facts in full and directing them to notify the entryman that he will be allowed to submit supplemental proof, without re-advertising, when he can show such continued residence upon the land, as will with the time of his residence and military service shown by his proof, amount to the full period of five years.

The local officers, instead of advising the entryman fully of the contents of said letter, notified him, on March 6, 1894, that your office requires him to make supplemental proof showing continuous residence on the land for one year after making final proof.

This notice was very unsatisfactory. The entryman replied under date of March 12, 1894, stating that the Adjutant General's certificate, filed with his homestead application, shows his military service to be

for two years, five months and fourteen days, and that his final proof shows residence on the land for two years and seven months, making the five years of military service and residence required. He therefore requested to be advised in what respect his final proof is insufficient, and for what reason he is required to make supplemental proof. On the same day he wrote a letter to the attorney whom he had engaged to attend to the submission of his final proof, informing him of the notice he had received, and requesting him to investigate the matter and ascertain if any mistake was made in the final proof. The attorney took no action in the matter further than to file the letter in the local office. March 18, 1894, G. W. Scott, the entryman's transferee, wrote to the local officers, advising them that Root claims to have served in the army for two years, five months and fourteen days, as evidenced by the Adjutant General's certificate. In said letter Scott requested the local officers in Root's behalf, to write to Root giving him detailed information, showing wherein the final proof is defective. March 26, 1894, Root again wrote to the local officers, stating that he had filed the Adjutant General's certificate in their office, and requesting its return to him. April 3, 1894, Scott wrote another letter, informing the local officers that he had bought the land from Root, that Root lived on the land only four months after making final proof, and that he claims to have served in the army for two years, five months and fourteen days. He therefore requested them to give him explicit information about the matter. April 22, 1894, Scott transmitted to the local officers a certificate of the Adjutant General of California, dated April 21, 1894, showing the time of Root's military service to be one year, five months and nine days. In his accompanying letter Scott stated that Root thought he had served in the army for two years, because he was enrolled in 1864 and mustered out in 1866.

To the inquiries of Root and of Scott in his behalf, and to the enquiry of Scott in his own behalf, the local officers made no reply. May 18, 1894, the register transmitted the letters written by Root and Scott to your office, and reported as follows:

In complying with requirements contained in your letter "C" of February 18, 1894, in the matter of "final proof" of James P. Root, I have the honor to report, that after considerable delay and correspondence I have succeeded in procuring a copy of the "Honorable Discharge" of said James P. Root, together with some of the correspondence which I have taken the liberty of transmitting for your further action in the matter, as it is left in a very unsettled state.

It will be observed that it was not necessary for the local officers to procure a copy of the honorable discharge (the certificate of the Adjutant General of California, filed by Scott); that the same was not procured through any effort on their part, and that they should have answered Root's inquiries, instead of transmitting the letters written by him and Scott to your office.

June 20, 1894, your office directed the local officers to advise the parties in interest that they will be allowed thirty days from receipt of

notice within which to show cause why said final homestead entry should not be canceled for non-compliance with the homestead law as to residence and cultivation.

December 7th, 1894, the local officers transmitted evidence of service of notice by mailing a registered letter to Root, at his last known address, on October 11, 1894, which letter was returned unclaimed with the postmaster's endorsement "removed and address unknown." June 19, 1895, your office held the entry for cancellation. February 16, 1895, Scott filed a petition alleging under oath that he purchased the land from Root on April 17, 1893. He therefore prayed that said decision of June 19, 1895, be set aside and that he be allowed to prove that he purchased the land and that thereupon patent issue to him. In a separate letter filed on the same day Scott's attorney requested that in case of denial of the petition the entryman's final proof be referred to the board of equitable adjudication. May 6th, 1895, your office denied the petition, and declined to refer the proof to the board of equitable adjudication on the holding that transferee could acquire no greater rights than the entryman had. Scott's appeal from said decision brings the case before me for consideration. It must be presumed that entryman made his final proof on April 4, 1893, in good faith. In his petition Scott states that he purchased the land without notice of the defect, April 17, 1893. From the circumstances in the case it is reasonable to believe that he purchased the land in good faith. The letters above referred to indicate that the entryman was perplexed by the meager notice to offer supplemental proof, given by the local officers March 6, 1894.

He earnestly requested to be informed in what particular his final proof is insufficient, and for what reason he was required to make supplemental proof, and should have been given the desired information. While it is probable that Scott notified the entryman of the time of his military service as shown by the certificate he had procured April 21, 1894, from the Adjutant General of California, the presumption does not warrant the finding that he did notify him. The mere notice to the entryman to make supplemental proof showing residence on the land for one year after making final proof, was not sufficient. There is nothing in the record to show that he ever found out why he was required to make supplemental proof. In view of that fact your office erred in requiring him to show cause why his entry should not be canceled.

It would be improper for the government, after the lapse of three years from the date of final proof, to undertake to ascertain the entryman's address, and it would be inequitable, in view of the treatment he has received at the hands of the local officers, to require him at this late day to make supplemental proof, or submit to the cancellation of the entry.

The appellant's request that the final proof be submitted to the board of equitable adjudication is therefore granted.

The decision of your office is accordingly reversed.

JUDICIAL PROCEEDING—FINDING OF FACT—JUDGMENT.

VIDAL *v.* BENNIS (ON REVIEW).

A finding of fact in a judicial proceeding can not be accepted by the Department as an adjudication where such fact does not appear to have been in issue or embraced in the judgment of the court.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896.
(E. M. R.)

This case involves the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 17 S., R. 1 W., Los Angeles land district, California, and is before the Department upon motion for review by Margaret Bennis, of departmental decision of February 10, 1896 (22 L. D., 124), in which, among other things, it was decided that as between Margaret Bennis of New York City, New York, and Jane Bennis of California, the Department would recognize the latter as the true widow of Spiro Bennis, the deceased entryman, it having appeared from the record that Jane Bennis was married to Spiro Bennis, May 31, 1890, and that she "continued to live with the entryman, Bennis, up to the time of his death on the 12th day of August, 1892; that prior to 1871, while in the city of New York, Spiro Bennis was married to Margaret Bennis; that in that year he removed to California and his wife refused to accompany him; that he had not seen his former wife for over twenty years, and at the time of his death had not heard from her for seventeen years and believed her to be dead; that this statement was made by her husband after he had been informed by the attending physician that he was about to die, and about twelve hours prior to his death."

In view of the provisions of the California civil code, Section VI., which declares a subsequent marriage to be illegal and void save where "(1) the former marriage has been annulled or dissolved"; or "(2) unless such former husband or wife was absent, was not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal," it was held that such subsequent marriage would be recognized "until its nullity is adjudged by a competent tribunal."

The motion for review raises, in effect, two questions: First, that the judgment heretofore rendered, and which is now about to be reviewed, was based upon *ex parte* evidence; that the same should have been remanded for the taking of testimony in order that the Department might intelligently pass upon the question of who was the widow of Spiro Bennis within the meaning of the homestead law; and, secondly, that the alleged marriage has been annulled by a court of competent jurisdiction, to wit, the Superior Court in and for San Diego county.

This Department is without authority to order a hearing to determine the question first raised by the movant. Such issues are left for the courts, where the rights of parties can best be asserted.

In support of the other ground of error raised, a certified copy of the judgment of the court is furnished.

IN THE SUPERIOR COURT OF THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA.

In the matter of the estate of Spiro Bennis, deceased.

This cause came on regularly for hearing on this 20th day of February, 1895, upon the petition of Jane Bennis for the probate of the alleged last will and testament of Spiro Bennis, deceased, and the grounds of opposition to the probate of said "will" filed by Margaret Bennis and Marto Bennis.

Wm. Humphrey, Esq., appearing for proponent, Jane Bennis, and Messrs. Sweet, Sloane and Kirby and J. M. Robinson, Esq., appearing as counsel for contestants and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys thereon and the cause having been submitted to the court for its decision, the court now finds the following facts:

I.

That at the time of signing the instrument filed herein by the said proponent Jane Bennis alleged, in her petition to be the "last will and testament" of Spiro Bennis, deceased; the said Spiro Bennis was not of sound and disposing mind.

II.

That said alleged will was not signed by any person as a witness at the request of said Spiro Bennis and that the said Spiro Bennis did not request any person whomsoever to be a witness of the execution or signing of said instrument by him.

III.

That said Spiro Bennis did not at the time of subscribing his name to said instrument or at any other time publish or declare the instrument to be his last will.

IV.

That said Spiro Bennis never acknowledged the said instrument to be his last "will" or testament.

V.

That the said petitioner, Jane Bennis, was never the lawful wife of the said Spiro Bennis.

VI.

That said contestant, Margaret Bennis, and said Spiro Bennis were on the 25th day of January, 1868, married, and from that time to the death of the said Spiro Bennis were husband and wife and that she is now the widow of said Spiro Bennis, deceased.

From the above facts the Court finds the following conclusions of law:

I.

That the said Spiro Bennis was incompetent to make a will.

II.

That said alleged will was not duly executed and attested.

III.

That said alleged will was invalid.

IV.

That said Spiro Bennis died intestate.

And the court further finds that the aforesaid instrument filed herein and alleged in said petition to be the last will of Spiro Bennis, deceased, be not admitted to probate, and that the probate thereof be and the same is refused and denied, and the contestants Margaret Bennis and Marco Bennis, are entitled to have and recover of and from the said Jane Bennis the sum of their costs in said action.

The issue joined here was whether a certain written instrument alleged to be the will of Spiro Bennis, deceased, was entitled to probate as such, and upon this issue thus joined, the court found, among other sufficient reasons for rejecting it, that the said Spiro Bennis at the time of the making of the alleged will, was not of sound and disposing mind, which finding was conclusive of the question at issue.

It is true that in the fifth finding of fact by the court, it is found that Jane Bennis was never the lawful wife of Spiro Bennis, and in the sixth finding of fact that Margaret Bennis is the widow of the deceased entryman, but these questions were not before the court, or at least are not shown to have been by any papers filed with the motion for review. It was the duty of the petitioner to have shown that these questions were properly before the court and to have pleaded a special statute, if any existed, upon which she relied. In the judgment of the court the question of who was the legal widow of the entryman was not adjudged. In the absence, therefore, of such judicial determination, the motion for review is dismissed, and the former decision of the Department is adhered to and affirmed.

HOMESTEAD—ADJOINING FARM ENTRY—EQUITABLE OWNERSHIP.

PEIRCE v. SNOW.

An adjoining farm entry, under section 2289 R. S., may be properly based upon the equitable ownership of an adjacent tract.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896. (E. M. R.)

This case involves the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 4, T. 33 N., R. 24 W., St. Cloud land district, Minnesota.

The record shows that on August 22, 1888, Charles B. Snow made adjoining farm homestead entry for the above described tract.

July 23, 1894, Edward C. Peirce filed an affidavit of contest alleging that the entryman had never settled upon the land and was not the owner of any adjoining land.

Testimony having been submitted before a justice of the peace at Oak Grove, Anoka County, Minnesota, September 15, 1894, and a hearing having been had before the local officers September 24, 1894, on October 4, 1894, they rendered their decision in which they recommended that the entry be canceled, holding that Snow was not the owner of the land he alleged to own, to wit, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 3, same township and range.

Upon appeal, your office decision of March 21, 1895, reversed the action of the local officers.

The evidence shows that one Stowell entered into a contract with the St. Paul, Minneapolis and Manitoba railway company for the purchase of the W. $\frac{1}{2}$ of said section, and subsequently in 1887 assigned his right and title to the defendant, Snow, who went into possession of the land and who has continuously resided thereon ever since and improved the said tract, together with the land in controversy, by building a house, barn and stable upon the land so purchased, and has cultivated a portion of the adjoining farm.

This entry was made under section 2289 of the Revised Statutes, which provides in part

And every person owning and residing on land may, under the provisions of this section, enter other lands lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

There is contained in the record the affidavit of certain officers of the St. Paul, Minneapolis and Manitoba railway company in which it is set out that the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of section 3, was owned by the railway company on April 19, 1883; that on that day the company sold the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, to James H. Stowell; that on June 3, 1884, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 3, was also sold to Stowell, who, on January 22, 1887, assigned both contracts to purchase to the defendants herein and that on March 11, 1893, Snow having made default in payments, the contracts were canceled by the railway company.

This testimony was objected to at the time, as incompetent, and irrelevant. The evidence is *ex parte*, the testimony of the affiants was not taken, and it is not the best evidence of the facts it seeks to establish.

There is no question about the residence of the defendant upon the land he claims to own, nor is there any dispute about his cultivation and improvement of the tract covered by his adjoining homestead entry. The only question is that of ownership under section 2289 of the Revised Statutes.

The evidence in this case—as distinguished from the testimony—is not of the most satisfactory or conclusive nature.

In *Carnes v. Smith* (10 L. D., 100), it was held *inter alia*, (syllabus)—

An adjoining farm entry under section 2289 R. S., may be properly based upon the equitable ownership of an adjacent tract; and residence on such tract, for the period of five years after such entry, warrants the submission of final proof.

And in *Leitch v. Moen* (18 L. D., 397), in speaking of a similar question, it was held, (syllabus)—

A fraudulent deed purporting to convey a tract from the homesteader to his son, will not operate to relieve the entryman from the statutory disqualification imposed upon persons that own more than one hundred and sixty acres of land.

Such disqualification also extends to one who holds lands under a contract of purchase though the payments thereunder have not been completed.

Reasoning from analogy, that case becomes conclusive of the one at bar. Snow was in possession under contract with the railroad company to purchase. Suppose he had failed to make the payments agreed upon, in view of his peaceable and uninterrupted possession, it would seem that the equitable title remained in him, and would so remain until otherwise determined by a court of competent jurisdiction. However that may be, the burden of proof rested upon the contestant in this case, and he has failed to produce competent testimony to substantiate the truth of his allegations. The defendant made out a *prima facie* showing of ownership, which has not been overcome.

Judgment affirmed.

SURVEYED LANDS—ABANDONED MILITARY RESERVATION.

WILLIAM COPPINGER ET AL.

In the case of a military reservation established on surveyed land, where the out-boundaries do not coincide with the lines of the public survey, and the fractional portions of the sections lying outside of the reservation are thereafter surveyed and lotted, the complements of said sections within the reservation, on the subsequent abandonment thereof, remain within the category of surveyed lands, as shown by the two plats of survey which should be taken together and treated as the single official plat.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 14, 1896. (E. B., Jr.)

I have considered the consolidated cases of William Coppinger and Elihu Coppinger, each, against the United States, on appeal from your office decision of June 1, 1895, affirming the rejections by the local office at Durango, Colorado, of their coal declaratory statements, offered March 4, 1895; that of the former being for

all that part of the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 12, and that part of SW. $\frac{1}{4}$ Sec. 13, lying within the boundaries of the late Fort Lewis military reservation, and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 13, in township 85 N., range 11 W., of the New Mexico P. M.,

and of the latter

for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and all that part of NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and all that part of W. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 12, lying within the boundaries of the late Fort Lewis military reservation

said township and range.

The local office rejected these coal filings on the same day they were offered on the same grounds in each case, to wit: that

the land described is not open to entry under the coal land laws being a part of the Fort Lewis military reservation established by executive order January 27, 1882; and now subject to disposal only under act of July 5, 1884, for abandoned military reservations, and the Hon. Secretary of the Interior has not yet arranged for disposal thereof under said act of Congress; and also there being no triplicate plat of said land on file in this (local) office describing land as in declaration.

On appeal your said office decision properly held that the lands included within the boundaries of what was formerly the said reservation (except as to certain sections therein not involved in this case) having been restored to the public domain, and to the jurisdiction of this Department, by executive order of February 12, 1895, under the act of July 5, 1884 (23 Stat., 103), the coal lands therein were not subject to disposal under said act, but under the law relating to coal lands (Sections 2347 to 2352, inclusive, Revised Statutes), and that the first ground of the local officers' decision was therefore error. Your said office decision also properly held that the act of August 23, 1894 (28 Stat., 491), did not apply to these cases. The affirmance by your office of the rejections of said filings by the local office is on the ground that declaratory statements under the coal land law must be for surveyed lands only, and that the land filed upon being unsurveyed and unsubdivided public land at the date the filings were offered, was, therefore, not subject to appropriation thereunder.

What has already been said by me herein disposes of the appeals in these cases, except as to the contention therein that your office erred in holding that the land was unsurveyed and unsubdivided, and hence not subject to appropriation as coal land. The records of your office show that said land is all within sections 12 and 13, T. 25 N., R. 11 W., Colorado, and was formerly part of said reservation, established as aforesaid; that the public surveys were extended over this entire township in 1880, and that the township plat thereof was filed in the proper local office July 13, 1880; and that the boundaries of said reservation within said township not conforming to the subdivisional lines of the public survey thereof, and thus including within such boundaries portions only, of certain quarter sections, among which were portions of quarter sections of said sections 12 and 13, the outboundaries of said reservation within said township were surveyed, and the township plat thereof was filed in the local office April 24, 1884.

This survey and plat thereof were made to facilitate the appropriation and entry of the public lands in said township on the outer borders of said reservation, only. All of the portions of quarter sections above mentioned lying outside of the reservation were lotted and properly numbered, and their respective acreages determined. The corresponding portions within the reservation, as indeed is true of all the remaining legal subdivisions of the township within the reservation, were not shown on this plat, it being unnecessary to show them for the obvious reason that the establishment of the reservation withdrew all the land therein from the jurisdiction of the Land Department, and hence from appropriation and entry under the public land laws.

These said corresponding portions, though not then lotted, needed no additional survey to determine their position, boundaries, or acreage. They were the complements of the parts of the quarter sections lying outside the reservation, and the survey of the latter made any

further survey within the reservation lines unnecessary. The original survey and subdivisional lines of the township within the abandoned reservation were intact when said filings were offered, not having been affected in any way by the establishment of the reservation or the said survey of the outboundaries thereof. The township within the abandoned reservation was all surveyed land, and hence regarded as legally subdivided at that time in contemplation of law. The plat of the original survey and the plat of the said survey of the reservation outboundaries, both on file in the local office when said filings were offered, were to be taken together, and, thus taken, constituted, as it were, the single official plat of the township.

It was error to determine the status of the land, or any part thereof, covered by said filings, relative to its classification as surveyed or unsurveyed, or subdivided or unsubdivided, as your office has done, according to the showing of the second of the said plats, alone. The descriptions hereinbefore quoted from said filings, both as to the parts of the quarter sections, and as to the full quarter quarter sections therein indicated, must be regarded, in view of the record herein, and for purposes of said filings, as legal subdivisions within the meaning of the law. They were correctly taken from official plats, located the land by fixed and definite boundary lines of the public survey, and indicated the acreage sought to be taken under each filing,—102.08 acres in the first and 114.08 in the second.

Since your office decision still another plat of the township has been filed in the local office (July 23, 1895), on which the parts of certain quarter sections above mentioned, within the lines of said reservation, are shown divided into lots; and on August 2, following, William Coppinger and Elihu Coppinger, each, offered amended filings for the same ground embraced in their original filings, respectively, but describing it, in each instance, according to the subdivisions shown on this latest plat.

So much of your office decision as affirms the rejection of said filings is accordingly reversed. You will direct the local officers to file the original declaratory statements of these parties as of the date when they were offered, and to allow the amendments thereof above indicated.

DESERT LAND FINAL PROOF—PROTEST.

DUNPHY v. FLOWERS.

A protest against the allowance of desert land final proof, on the ground of the failure of the entryman to secure a water supply and effect reclamation, must be dismissed, if on the day advertised he does not submit final proof, and further time therefor exists under the statute.

Secretary Smith to the Commissioner of the General Land Office, May 14, 1896. (W. F. M.)

On June 11, 1892, Howard D. Flowers made desert land entry of lots 3 and 4, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of section 2, township 1 N., range 3 E., within the land district of Bozeman, Montana, and on November 9, 1893, he made publication of his intention to make final proof on December 18, following. On the last named date Thomas E. Dunphy filed a protest alleging, in substance, failure to make the required expenditure on the land, that a contract was made, before entry, to convey the land, that the entry was made for the benefit of certain other persons named, and failure to acquire the necessary water rights.

Flowers did not offer his final proof on the advertised date for the reason, as stated by him in his testimony, that he did not have the money to make the required payments. A hearing was held, however, on the issues raised by the protest, and the register and receiver dismissed it and recommended that the entry remain intact. This decision was affirmed by your office and the case is now here on further appeal.

The entryman has until June 11, 1897, to make his final proof. 28 Stat., 226. Since he has not offered his final proof, all charges as to failure in the respect of reclamation and securing water rights and supply, must fall. This is the practice in pre-emption cases, and the rule is equally applicable here. *McCracken v. Porter*, 3 L. D., 399; *Haley v. Harris*, 13 L. D., 136.

As to the remaining allegations, the testimony is conclusive that the entry was made for the exclusive use and benefit of the entryman and that sums much in excess of the amount required by law have been expended on the land.

The decision appealed from is affirmed.

WAGON ROAD GRANT—DEFINITE LOCATION.

MCDOWELL v. THE DALLES MILITARY WAGON ROAD CO.

The grant to this company by the act of February 25, 1867, is a grant in place, and the rights of the road thereunder attach on definite location.

Secretary Smith to the Commissioner of the General Land Office, May 20, 1896. (A. E.)

A decision was rendered in the above entitled case by the Department on March 7, 1896, in which your office action in holding the entry of McDowell for cancellation was affirmed.

The land involved was the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Lot 5 and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, Tp. 19 S., R. 47 E., Burns, Oregon.

The entry of McDowell was held for cancellation by your office because it conflicted with the prior right of the Wagon Road Company under its grant (14 Stat., 409).

McDowell has now filed in this Department two affidavits to show that at the date the right of the Wagon Road Company attached the land was in the possession of a settler, and he requests a hearing on the question as to whether the land was or was not excepted from the operation of the grant by reason of such settlement.

By the grant in question (February 25, 1867, 14 Stat., 409), Congress granted all the "alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road," except "any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority."

This grant is clearly a grant in place, and the right of the road attached on the filing of the map of definite location, November 1, 1869. In this case it is claimed the settlement existed at the date of withdrawal, on December 14, 1871. As this was after the right of the road attached, it is unnecessary to determine whether settlement excepts the land from the operation of this particular grant or not.

For this reason, such a hearing would avail nothing, and the motion is denied.

FINAL DECISION—REVIEW—RULE TO SHOW CAUSE.

NORTHERN PACIFIC R. R. CO. *v.* ROSENCRANCE.

A final decision of the General Land Office should not be reopened by the commissioner in an ex parte proceeding, and the judgment therein modified without prior notice to the adverse party in interest; but if such action is thus taken, and the party adversely affected thereby is then notified of his right of appeal therefrom, such notice should be treated as a rule to show cause why the judgment, as modified, should not stand, and his appeal as the answer thereto.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 20, 1896. (J. L.)

This case involves the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 4 of section 23, T. 9 N., R. 28 E., containing 62.55 acres of land in Walla Walla land district, Washington. It is brought before this Department by the appeal of Benjamin Rosencrance from your office decision of January 26, 1895, holding for cancellation his pre-emption cash entry No. 3088 of April 11, 1885, as to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of lot 4 of said section 23, (part of the land embraced in said entry), upon the ground that said subdivisions were within the granted limits of the Cascade branch of the Northern Pacific Railroad Company as authorized by the joint resolution of May

31, 1870 (16 Statutes, 378), and were vacant and unreserved lands on June 29, 1883, the date at which the map of definite location of said Cascade branch was filed in the General Land Office.

On October 4, 1880, the company filed its map of definite location of its main line from Wallula to Spokane Falls, opposite the tracts involved here. And on June 29, 1883, it filed its map of definite location of its branch line from Yakima to Ainsworth (a station about twelve miles north of Wallula on the main line), opposite said tracts.

On January 3, 1867, one Stephen D. Martindale made homestead entry—No. 665 of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2, 3 and 4 of section 23 aforesaid containing 147.10 acres. Said entry remained of record until November 2, 1871, when it was canceled.

On January 8, 1872, one William Hatch filed his pre-emption declaratory statement for all the tracts aforesaid alleging settlement on November 2, 1871, the date of the cancellation of Martindale's entry. On June 7, 1872, Hatch transmuted his pre-emption filing into a homestead entry No. 90, of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 4 of section 23, containing 62.55 acres; and on the same day one Smith Burnham made homestead entry No. 91 of the other tracts embraced in Hatch's filing, to wit, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2 and 3 of said section 23, containing 84.55 acres.

Hatch's entry of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 4, remained of record until November 2, 1882, when it was canceled for abandonment, because ten years had elapsed after entry without tender of final proof. And the Northern Pacific Railroad Company contested Burnham's entry of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2 and 3.

On November 21, 1882, your office dismissed the contest, and held Burnham's entry intact. The company appealed and on March 25, 1884, this Department affirmed said decision.

On August 14, 1884, Burnham relinquished his entry, and the same was canceled. And on the same day, Benjamin Rosencrance filed his pre-emption declaratory statement No. 5332 for lots 2, 3 and 4 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 23 (including the 62.55 acres of Hatch and the 84.55 acres of Burnham), alleging settlement on August 12, 1884. On April 11, 1885, after due publication, Rosencrance made final proof and payment, and procured final certificate of entry of the whole of the tracts aforesaid.

Sometime afterwards (the record before me does not show when or how), the Northern Pacific Railroad Company contested Rosencrance's pre-emption cash entry aforesaid, and claimed all of said tracts under its grants. On January 21, 1893, your office found that all of said tracts "were covered by existing *prima facie* valid filings and entries at the several dates of filing maps, (1) of general route, (2) amended general route, and (3) definite location, and the withdrawals following, and were excepted from the operation of the Northern Pacific grants;" and therefore "held the Rosencrance entry for approval for patenting;" and rejected the company's claim.

Notice of said decision was served upon the company. No appeal was taken. Whereupon, the decision was declared final and the case was closed, by your office letter "F" of July 7, 1893, addressed to the local officers. Your office thus transmitted to Rosencrance the highest evidence (except probably a patent), that the Executive Department could furnish, to establish his title and assure his quiet possession of his property.

Nevertheless, more than a year and a half afterwards, to wit, on January 26, 1895, your office, without notice to Rosencrance, re-opened the closed case, and gave the following reason for doing so.

The attention of the office has been called to the fact, that while the decision as above was correct as to the main line, part of the land involved passed to the company upon definite location of its branch line.

It appears now, that on January 2, 1895, the attorney for the Northern Pacific Railroad Company resident in the city of Washington, D. C., filed in your office a letter, in which after reciting that "On 27 November, 1894, your office filed for patent (Division "F") Walla Walla cash entry No. 3088 of Benjamin Rosencrance for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 2, 3 and 4 of section 23, T. 9 N., R. 28 S., W. M.", he proceeded to refer to your office decision of January 21, 1893, and suggested that your office had not determined the rights of the company under the grant for its branch line. He then called attention to the fact that in the interval between the cancellation of Hatch's entry on November 2, 1882, and the filing of Rosencrance's pre-emption declaratory statement on August 14, 1884, the company on June 29, 1883, filed its map of definite location of its branch line. And without offering any evidence or making any statement as to the actual status of the land during said interval, he requested your office to re-examine the case, and to take "immediate action to the extent of suspension of the entry."

Thereupon your office proceeded *ex parte* to find as a matter of fact, that on June 29, 1883 (the date of the filing of the map of definite location of the Cascade Branch line), "the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 4 aforesaid were vacant and unreserved." The record did not justify the finding that said land which had been under cultivation as a farm ever since January 3, 1867, the date of Martindale's entry, was in fact vacant and unoccupied on June 29, 1883.

Mr. Rosencrance should have been allowed a chance to show cause why his entry should not be disturbed eighteen months after the case had been closed. He was entitled to know who it was that called the attention of your office to the case again, after it had been finally decided for so long. The first notice that Rosencrance had of this *ex parte* proceeding was service of a copy of your office decision holding his entry for cancellation as to 62.55 acres of land; and informing him of his right of appeal.

Under the circumstances, this Department is constrained to consider said notice as a rule to show cause why Rosencrance's entry should

not be canceled as to 65.55 acres of land; and his appeal and the affidavit filed in support of it, as his answer to said rule.

With the appeal are affidavits of Benjamin Rosencrance, the entryman, and John W. Ritchie, a neighbor, showing the following facts:

On November 2, 1882 (which was the date of the cancellation of Hatch's homestead entry of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 4 aforesaid), Rosencrance was, and for some time previous thereto—as early as April, 1880,—had been, living with his family in a house on said lot 4, claiming, holding and using as a farm and place of residence the said lot, and the contiguous SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 23. That besides his dwelling house, his improvements on lot 4 consisted of a stock-yard fenced in about four hundred feet square, with one hundred and fifty tons of hay therein, and a stable for stock eighteen by three hundred feet. On the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, he had four corrals, a stable twenty by twenty feet, three quarters of a mile of fencing, and ten acres of plowed land,—the other thirty acres being under cultivation as a meadow. His garden was on lot 4 near his dwelling house. And the two tracts, were all under one fence. His improvements were worth at least \$1,000. During the winter of 1882–83 and spring of 1883,—prior to June 29, 1883, the date of filing the map of definite location for the branch line—he spent four hundred dollars for grubbing on said land. On December 14, 1882, he offered to file at the Walla Walla land office his pre-emption declaratory statement for said land, but the same was rejected by the local officers on the ground of conflict with the grant to the Northern Pacific Railroad Company. At that time, and until March 25, 1884, the case of Smith Burnham, (in which the only question to be decided was, whether Martindale's homestead entry and Hatch's pre-emption filing were sufficient to except the tracts of land covered thereby, from the operation of the company's grants), was pending on appeal before this Department. Rosencrance awaited the decision of that case, and in the meantime continued to reside upon, cultivate and improve said lot 4, and the contiguous forty acres. By departmental decision of March 25, 1884, Burnham gained his case, and the status of the tracts involved was determined, at least so far as the claims of the Northern Pacific Railroad Company then asserted, were concerned. Whereupon Rosencrance bought Burnham's possessory rights, his improvements and relinquishment; and on August 14, 1884, he filed his pre-emption declaratory statement for both tracts—the tract which Hatch formerly had and on which Rosencrance had resided since April 1880, and the Burnham tract which Rosencrance took possession of on August 12, 1884, the date of his purchase from Burnham of the improvements on the land adjoining his residence.

Rosencrance has shown sufficient cause why his entry should not be canceled either in whole or in part. His answer is perfect, if the facts alleged in the affidavits be true. The affidavits were filed in the local office on April 15, 1895, and were transmitted with the appeal to your

office, on May 27, 1895. The truth of the statements therein made, has not been controverted by the company or its attorneys, even in argument.

Under these circumstances this Department would assume the facts stated in the affidavits aforesaid to be true, and would proceed to decide the case at once, but for the fact, that other attorneys appeared for the company on April 1, 1896, and filed in this Department a motion "that the argument and *ex parte* affidavits filed by Rosencrance may be returned to him, because no copies thereof have been served upon the Railroad Company, as required by the Rules of Practice." While it does appear that Rosencrance's appeal and specifications of errors were duly served upon the company, it does not appear affirmatively that the affidavits of Rosencrance and John W. Ritchie, and the argument of Rosencrance's attorney, were so served. The company should be allowed an opportunity to traverse the statements contained in said affidavits if it desires to do so, and in that event to have a hearing to determine whether they be true or not.

Your office decision of January 20, 1895, is hereby set aside and annulled. You will advise the railroad company of the allegations made by Rosencrance in the affidavits herein referred to relative to settlement and residence antedating the date of definite location of the branch line of its road, and in the event of its failure to file affidavits tending to show that settlement and residence were not made and continued as alleged, within thirty days from notice of this decision, that the claim of the company will be rejected and the entry will remain intact. Should such affidavits be filed a hearing will be proceeded with as in other cases made and provided. (Northern Pacific R. R. Co. v. McMahan, 17 L. D., 507).

REPAYMENT-DESERT LAND ENTRY.

JEDEDIAH F. HOLCOMB.

An entry of desert land within railroad limits at double minimum price is not an entry "erroneously allowed" on which repayment of the first installment of the purchase price can be made, where the entry is canceled for non-compliance with law.

Secretary Smith to the Commissioner of the General Land Office, May 20, 1896. (W. C. P.)

I have considered the appeal of Jedediah F. Holcomb from your office decision of February 8, 1896, refusing his application for the repayment of \$80, being the preliminary payment made by him on a desert land entry for the E. $\frac{1}{4}$ of section 8, T. 14 N., R. 75 W., Cheyenne, Wyoming, land district.

This entry was made December 24, 1881, and was canceled September 22, 1885, because of failure to make proof within the time required

by law. About the last of January, 1896, the attorneys for the entryman filed an application for the repayment of the amount paid upon said entry. This application is made upon the theory that the act of 1877 did not contemplate or include within its provisions lands of the United States which, because of being situated within the limits of a railroad grant, could not be sold for less than the double-minimum price. It is claimed that such lands were absolutely excepted from the operation of the act of 1877, providing for the sale of desert lands, and therefore the entry in question was erroneously allowed and could not have been confirmed, by reason of which the entryman is entitled to repayment of the purchase money under the provisions of Sec. 2 of the act of June 16, 1880 (21 Stat., 287). In support of this contention the case of *United States v. Healey* (160 U. S., 136), is cited.

It is well said in your decision that the supreme court did not have before it in that case the question of the legality of entries under the desert land law for land within the limits of grants to railroads, the only question being as to the price to be paid for that class of lands under such entries. This fact should be borne in mind in reading said decision and applying it to the case under consideration here. The court said:

An examination of the statutes regulating the sale of the public lands is necessary in order to determine the question now presented. That question is, whether the act of 1877, providing for the sale of "desert lands," embraces alternate sections reserved to the United States, along the line of railroads for the construction of which Congress made a grant of lands.

The facts in the case are that Healey, who had been required to pay \$2.50 per acre for the land covered by his desert land entry, sought to recover one-half the money so paid, on the theory that the act of 1877, under which he had purchased the land, fixed the price at \$1.25 per acre. The question was as to whether this class of lands was embraced in the provisions of the act of 1877 as to price, and this is what the court said. The whole tenor of the decision is to this effect. The sense in which the word "embraces" is used by the court is clearly shown by one paragraph in the decision. It is said:

Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore, did not embrace alternate sections reserved to the United States by a railroad land grant.

This Department has never held that the act of 1877 did not embrace desert lands within the limits of railroad grants in the sense that such entries of that class of lands were not allowable. On the contrary, such entries have been allowed without question. It was held that the provisions of said act of 1877 as to price did not apply to these lands, and in this sense only was it held that said act did not embrace these lands. It is evidently in this sense that the court used the word "embrace" all through said decision. The court recognizes the fact

that such entries have been allowed, and does not say specifically that the practice was wrong. It may be sufficient to say that the question not being before the court, it very properly refrained from making any such specific statement. If this be true, it is then sufficient for the determination of this case to say that the question of the legality of such entries has not been presented or passed upon by that court.

The validity of such entries having been recognized by this Department for so long a time with the result that much money has been invested in the purchase and improvement of this class of lands upon the faith of the construction given such law, is sufficient reason for hesitation in declaring such construction to be wrong. I am not inclined to so hold until more convincing arguments are presented than those made in support of the application now under consideration, or until the supreme court shall have distinctly held the practice to be wrong.

The fact remains that the entry in question was not erroneously allowed, and that patent would have issued thereunder if the entryman had complied with the requirements of the law on his part.

It appears by a late communication from the attorneys for Holcomb, that they have initiated proceedings in the courts for the recovery of this money. If I were inclined to the opinion that he is entitled to repayment, but still entertained a doubt as to his right, I would still hold it to be the better plan, under all the circumstances, to allow the courts to pass upon the question, to the end that it might be definitely settled.

The decision appealed from, which refused the application for repayment, is affirmed.

RAILROAD GRANT-INDEMNITY SELECTIONS-CANCELLATION.

WILLEY *v.* NORTHERN PACIFIC R. R. CO.

A list of indemnity selections filed by the Northern Pacific company without designating the bases therefor, prior to the order of May 28, 1883, excepting said company from the general terms of the circular of 1879 requiring such designation, is protected by said order of 1883, in the absence of any intervening claim, and is not invalidated by the circular order of August 4, 1885.

The Northern Pacific company is entitled to indemnity for lands excepted from its grant on account of a prior grant to another company.

An entry allowed by the local office should not be subsequently held for cancellation without first affording the entryman an opportunity to show cause why such action should not be taken.

Secretary Smith to the Commissioner of the General Land Office, May 20, 1896. (F. W. C.)

With your office letter of May 5, 1896, was forwarded a petition for writ of certiorari, filed on behalf of Norman Willey, in the matter of the case of Norman Willey *v.* Northern Pacific Railroad Company, involving the NW. $\frac{1}{4}$ of Sec. 31, T. 132 N., R. 55 W., Fargo land district, North Dakota.

From the showing made in said petition it appears that this tract is within the indemnity limits of the grant for said company, and on October 21, 1895, the local officers accepted the homestead application tendered by Willey, the same going to record as homestead entry No. 21691.

This entry was considered by your office in letter "F" of December 26, 1895, and was held for cancellation for conflict with the selection made by the company on April 9, 1883, list No. 7.

From said decision Willey appealed, urging that the company's selection was invalid and no bar to his entry.

This appeal your office returned because not accompanied by evidence of service upon the company, and fifteen days allowed under rule 82 of practice within which to furnish evidence that service had been made as required by the rules.

Thereupon the present petition was filed, in which it is urged that the selection of 1883 is invalid and has been so adjudged in the case of Hall against said company, and that Willey was a settler at the date of filing of the rearranged list, February 23, 1892.

There are a great number of these petitions, all presenting substantially the same state of facts, and I have carefully considered the full showing made, and, waiving technical defects in the petition, must deny the same because, as far as shown, the petitioner has suffered no injury by the action taken.

The company first selected this land in list No. 7, April 9, 1883. Said list was not accompanied by a designation of losses to the grant as a basis therefor.

No right is shown to have intervened between that date and May 28, 1883, the date of departmental circular excepting the Northern Pacific Railroad Company from the requirement exacted by the circular of 1879 requiring the designation of bases for all indemnity selections. The selection was protected by said order and was not invalidated by the order of August 4, 1885 (4 L. D., 90). See *Sawyer v. Northern Pacific R. R. Co.*, 12 L. D., 448.

The company, in October, 1887, filed a designation of losses in bulk, which were rearranged in the list of February 23, 1892.

Willey alleges that he was a settler at the last named date, but whether prior to this time is not shown. The fact as alleged would avail him nothing, as the selection of 1883 was, as before stated, protected by the circular of May 28, 1883.

In the Hall case referred to, Hall alleged settlement in 1880, so that he was prior to the selection of 1883.

The losses assigned by the company in the lists of 1887 and 1892 were of lands east of Superior, Wisconsin.

In the case of the Northern Pacific Railroad Company, considered by this Department November 13, 1895 (21 L. D., 412), it was held that (syllabus):

The right of said company to form a connection with Lake Superior as its eastern terminus could be exercised either through actual construction of its own road, or through a-sociation or consolidation with some other company, and by the latter course said company, through an apparent consolidation with the Lake Superior and Mississippi railroad, from Thomson's Junction, in Minnesota, to Duluth in the same State, secured such terminus, and thereby exhausted its right to fix the eastern terminal point of its road, by construction of its own line, if such consolidation was not in fact effected. But if such consolidation was not such an association or confederation as contemplated by the granting act, then the eastern terminus of the grant is at Superior City, Wisconsin, the first point at which said company, by its own road, reached Lake Superior.

It appearing that lands east of Superior City have been made the basis of indemnity selections in North Dakota, and that the action of the Department hitherto has given color to such claim, it is hereby directed that the company be allowed sixty days from notice hereof within which to specify a new basis for any selections avoided by this decision.

Acting hereunder the company assigned new bases November 26, 1895, the sufficiency of which is not attacked.

It is further urged that the losses as originally assigned were not proper bases for the reason that, if the lands were granted to the Omaha company under a prior grant, the Northern Pacific Railroad Company would not be entitled to indemnity therefor.

In the case of *Bardon v. Northern Pacific Railroad Company*, 145 U. S., 538, it is stated, in referring to the grant for the Northern Pacific Railroad Company, that

the statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof, etc.

This fully answers the last contention of counsel in the petition and, as before stated, the same is denied.

In this connection I must add that I cannot approve of the action taken in these cases, holding for cancellation, without first affording the entryman an opportunity to show cause, any entry allowed by the local officers, and in future you will apprise the entryman of any objections that may appear to the recognition of his entry and first afford him an opportunity to show cause, before action is taken looking to the cancellation of his entry.

RAILROAD GRANT—SETTLEMENT RIGHT—SELECTION.

NORTHERN PACIFIC R. R. Co. v. LYNCH.

When settlement and occupancy alone, at the time rights under a railroad grant attach, are relied upon to except the land from such grant, it must affirmatively appear that the party in possession had the right, at that time, to assert a claim to the land in question under the settlement laws.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (C. W. P.)

With your office letter of August 6, 1893, you transmitted the case of the Northern Pacific Railroad Company v. Alexander H. Lynch, involving the NE. $\frac{1}{4}$ of section 35, township 16 N., range 44 E., Walla Walla land district, Washington.

Said tract is within the indemnity limits of said road, and was selected on account of the grant December 17, 1883.

Lynch applied to make homestead entry of the land on October 27, 1887, alleging settlement about August 6, 1884.

The company filed a protest against said application.

A hearing was had. The local officers decided in favor of Lynch. The company appealed. Your office affirmed the decision of the local officers.

The company appeals to the Department.

The testimony shows that one William H. Evett went upon the land in the spring of 1881, and erected a foundation for a house; that in June, 1881, he let his brother, James F. Evett, have his interest in the tract, who did some fencing and planted out a garden and some shrubbery; that he built a house, a barn sixteen by thirty feet, with one shed twelve feet long and one sixteen feet long, and he moved upon the land in the fall of 1881, and resided thereon continuously until 1884, when he sold his claim, his possessory right thereto, to Alexander H. Lynch; that Lynch established his actual residence on the land in the fall of 1884, and the same has been continuous; that he built an addition to the house twelve by fourteen feet wide and eighteen feet long, broke eighty-five acres, planted out an orchard of one hundred trees, and placed the whole tract under fence, and that his improvements are worth about \$1,200.00.

The decisions of the Department hold that, within the indemnity limits, the Northern Pacific Railroad Company has not such claim as will bar the acquirement of a settlement right, until it has made selection in the manner prescribed. The company cannot, therefore, be held to have had such a claim as would bar the settlement right of James F. Evett, if he was duly qualified to enter the tract under the settlement laws.

When settlement and occupancy alone, at the time the rights under a railroad grant attach, are relied upon to except the land from such

grant, it must affirmatively appear that the party in possession had the right at that time to assert a claim to the land in question, under the settlement laws (*Northern Pacific R. R. Co. v. Stark*, 15 L. D., 53; *Irvine v. Northern Pacific R. R. Co.*, 14 L. D., 362). The testimony does not show that James F. Evett was qualified to make an entry under any of the settlement laws.

The present claimant (Alexander H. Lynch) should be notified that he will be allowed to submit supplemental proof as to whether said Evett had at the date of the company's selection the qualification to enter the land under the settlement laws, after due notice and service upon the company (*Northern Pacific R. R. Co. v. McCrimmon*, 12 L. D., 554).

Your office decision is modified accordingly.

RAILROAD GRANT—INDEMNITY SELECTIONS—DESIGNATION OF LOSS.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* ROWAN ET AL.

A list of indemnity selections resting on a designation of losses in bulk will not be regarded as a bar to the disposition of the lands so selected; nor will a subsequent specific designation of losses validate such list if the company is not entitled to make said selections on the losses so assigned.

Secretary Smith to the Commissioner of the General Land Office, May 23, 1896.
(F. W. C.)

I have considered the appeal by the St. Paul, Minneapolis and Manitoba Railway Company from your office decision of November 20, 1895, holding for cancellation its list of indemnity selections covering certain tracts selected along its main line embraced in the application of Luke L. Rowan and seventeen others. Said lands are within the St. Cloud land district, Minnesota.

It appears from your office decision that these lands are within the twenty mile or indemnity limits along the main line of said road and were included in list of selections filed April 22, 1885 (list No. 10), for which indemnity was designated in bulk. The indemnity withdrawal made on account of the main line was revoked by departmental order of May 22, 1891 (12 L. D., 549).

Your office decision held the company's selection for cancellation because there had been no specific designation of the losses tract for tract as required under the order issued by your office in obedience to the direction contained in departmental decision in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406).

In its appeal the company urged that the matter was one of fact and that your office erred in holding that the company had failed to file a

specific designation of its lost lands, tract for tract, on account of said selection list No. 10. This matter is made the subject of a special report by your office letter of May 12, 1896, in which it is stated as follows:

The company in its appeal alleges that on August 15, 1891, it transmitted to this office a copy of said list accompanied with a specific designation tract for tract of the lands within its place limits in lieu of which said lands were selected and claimed; such selection being in strict accordance with the regulations of the Department. And you direct that a careful examination of the matter be made by this office of the facts as to whether such list was received here on August 15, 1891, or at any other time, and report to your office.

In answer thereto, I have the honor to report that, after diligent search, rearranged list No. 10, with others, claimed by the company to have been transmitted with letter of August 15, 1891, was discovered in this office.

This list was received at this office August 19, 1891, and contains a designation of lost lands tract for tract as a basis for the selection of April 22, 1885. This latter basis is for lands along the St. Vincent Extension, whereas the selected lands are along the main line of the St. Paul, Minneapolis and Manitoba road.

The designated basis of April 22, 1885, which in bulk equaled the selected lands, was for losses along the main line. It will thus be seen that the company substituted an entirely new basis in its rearranged list No. 10.

In the case of St. Paul, Minneapolis and Manitoba Railway Company *v.* Hastings and Dakota Railway Company (13 L. D., 440), it was held that the specification of losses on the line of the St. Vincent Extension can not be accepted as a basis for selections on the main line of St. Paul, Minneapolis, and Manitoba Railway Company, and in the case of La Bar *v.* Northern Pacific Railroad Company (*supra*), you were directed to—

call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned in the manner prescribed, at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim.

The designation made by the company August 15, 1891, on account of the selections along the main line being of lands lost to the grant along the St. Vincent Extension of said road, can avail the company nothing, and while in your report it is admitted that your office decision was in error in holding that the company had never filed a list of losses rearranged tract for tract on account of said selection list No. 10, yet the action taken in your office decision must be affirmed, for the reason that the designation as made was not a proper one, and the land covered by the applications of Luke L. Rowan and others will, in accordance with the direction given in the La Bar case, be disposed of without regard to the selection list of April 22, 1885.

APPLICATION—VACANCY IN LOCAL OFFICE—SETTLEMENT.

HILLEBRAND *v.* SMITH.

Applications to enter received during a vacancy in the office of the register must be treated as simultaneous, on the resumption of business in the local office.

In the case of simultaneous applications to enter, where one of the applicants has settled upon and improved the land, and the other has not, the priority of right should be accorded to the actual settler.

Secretary Smith to the Commissioner of the General Land Office, May 23, 1896. (F. W. C.)

I have considered the appeal by C. S. Hillebrand from your office decision of February 14, 1895, rejecting his several applications to make homestead entry of the NW. $\frac{1}{4}$ of Sec. 10, T. 15 N., R. 3 W., Guthrie land district, Oklahoma, for conflict with the prior application by R. V. Smith.

This tract was formerly covered by the homestead entry of Chas. W. Coombs made April 26, 1889, commuted to cash entry August 22, 1893. Coombs's entry was contested and the case regularly prosecuted to this Department resulting in departmental decision of April 5, 1894, by which Coombs's entry was canceled for illegality, it being found that he had entered the territory of Oklahoma during the prohibited period. While the case was pending before this Department the contestants withdrew.

Prior to departmental decision of April 5, 1894, canceling Coombs's entry, to wit, on February 26, 1894, W. D. Lindsey, the former register at the office in Guthrie, died and his successor did not enter upon the discharge of his official duties until June 1, 1894. After the cancellation of Coombs's entry and prior to June 1, 1894, numerous applications were received at the local office to enter the tract formerly covered by Coombs's entry. Those material to the present controversy are as follows:

Ralph V. Smith, April 7, 1894;

Chas. G. Hillebrand, April 13, 1894, and

Ralph V. Smith (2d application), May 21, 1894.

These several applications were not acted upon on account of the vacancy of the office of register, and on June 1, Smith renewed his application to make homestead entry accompanying the same with a new homestead affidavit. On the same date Hillebrand filed another application to make homestead entry of this land, which application, together with the petition by Smith, was suspended because of the several previous applications which were undisposed of.

On June 3, 1894, the local officers recommended that Smith's application received May 21, 1894, be accepted, holding that it was the first received after the cancellation of Coombs's entry and that the other applications should be rejected for conflict therewith. From this action Hillebrand appealed and Smith also appealed, urging that his rights should be held to be prior under his first application presented April 7, 1894.

The appeals by Smith and Hillebrand were considered in your office decision of February 14, 1895, in which Smith's contention was sustained, it being held that his application of April 7, 1894, was the first after the cancellation of Coombs's entry and should be allowed to go of record. From said decision Hillebrand has appealed to this Department.

In this connection I might call attention to the fact that at the time of filing his application on April 13, 1894, Hillebrand alleged that he was then residing on the land and that he had made improvements thereon valued at about \$1500.

In the case of *Williams v. Loew* (12 L. D., 297), it was held that an application to enter, filed during the vacancy in the register's office is, in contemplation of law, submitted for official action when the vacancy in said office is filled (syllabus).

This decision has never been overruled and upon inquiry at your office I learn that the same has been the guide of your office in disposing of applications made during the vacancy of the office of register. Your office decision, however, seems to have misconstrued the effect of said decision in according priority to one application over another presented during the time the office was closed.

As before stated, applications presented during the vacancy are submitted for official action when the vacancy in the office is filled, or, as stated in the language of the opinion:

But when the vacancy is filled, the machinery of the office resumes its work and the register and receiver in the exercise of official duty proceed to adjudicate all cases on file and pending in their office.

Those received during the vacancy must be, upon the resumption of business, treated as filed at that time, or as simultaneous applications; and as Hillebrand alleged settlement upon and improvement of the land his application takes precedence over that of Smith, and he should be permitted to complete entry of the land. See rules for disposing of simultaneous applications, page 14, General Circular of October 30, 1895.

Your office decision is therefore reversed.

OKLAHOMA LANDS—CHEROKEE OUTLET—BOOTH CERTIFICATE.

W. E. MORRIS.

A refusal to issue a booth certificate on account of a statement by the applicant that he has been "in the Cherokee Outlet every other day to procure water for his own use," is not justified, where the application is otherwise in due form.

Entrance within the Territory during the prohibited period for the sole purpose of procuring water for domestic use does not operate as a disqualification of the settler.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (A. E.)

The land in this case comprises lots 3, 7, 8, and 9, Sec. 31, Tp. 20 N., R. 9 E., Perry, Oklahoma, opened to entry on September 16, 1893, by virtue of the act of March 3, 1893 (27 Stat., 643), and the proclamation

of the President, August 19, 1893 (28 Stat., 1222). Morris applied to make homestead entry on November 17, 1893.

It appears from the papers in the case that Morris appeared at one of the booths on September 13, 1893, and offered a declaration. This declaration was the printed form issued by the General Land Office. In addition to the formal statements, claimant had inserted the words: "that for the past year I have been in the Cherokee Outlet every other day to procure water for my own use." Because of this additional statement the booth clerk judicially determined that claimant was not entitled to a certificate, and refused to issue him one.

Morris subsequently applied at the local office to make homestead entry, and his application was rejected because he did not produce a certificate from the booth clerk.

On March 30, 1895, your office passed over the only point that could be raised by the appeal, which was, whether the rejection because Morris had no certificate was proper, and without giving a hearing affirmed the rejection because Morris had been in the Outlet during the prohibited period.

From this Morris appealed.

The act of 1893 provides (*inter alia*) that:

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement.

In the proclamation it is provided, with relation to the issuing of certificates by the clerk in charge of booths, that each person desiring to enter will be required to

make a declaration in writing according to the form hereto attached showing his or her qualifications whereupon a certificate will be issued by the officers in charge of the booth to the party making the declaration.

Upon making the statements required by the regulations the applicant was entitled to a certificate, and the words added in the statement to the booth clerk were not such as to justify him in refusing certificate in this case.

The rejection by the local office of the application to make homestead entry because no booth certificate accompanied it was proper, if Morris was required to have such certificate, but your office decision in deciding that Morris was disqualified because he admitted being in the Territory to obtain water was incorrect, as no opportunity had been given him to show justification.

In his affidavit, corroborated by five persons, Morris shows that for twenty months prior to the opening he lived in the Creek Nation under lease from said nation; that the only water which he could get for his family and stock was a half mile north of the south line of the Outlet, and that he had been in the habit of going there for water; that his trips into the Outlet were confined to this purpose.

This can not be held to be in violation of the proclamation, and your office decision is reversed, and you will allow Morris to make entry.

MEYERS v. MASSEY.

Motion for review of departmental decision of February 10, 1896, 22 L. D., 159, denied by Secretary Smith May 23, 1896.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

IGNATZ REITOBER.

An entry made on the relinquishment of a prior entry, under the mistaken belief of the local office and the entryman in the bona fide character of said relinquishment, when in fact it was fraudulent, is "erroneously allowed," and the entryman is accordingly entitled to repayment of the fees and commissions paid thereon.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (C. J. G.)

The record in this case shows that on October 7, 1893, Maxey Collins made homestead entry for the SW. $\frac{1}{4}$ of Sec. 31, T. 22 N., R. 5 W., Enid land district, Oklahoma.

On January 29, 1894, Ignatz Reitober made homestead entry for said land, his application being accompanied by what purported to be a relinquishment by Maxey Collins. The latter's entry was canceled.

It appears that Reitober procured the relinquishment from one Milton Rector who represented himself as the agent of Maxey Collins, paying \$300 therefor. Afterwards, upon hearing that there was something wrong about the relinquishment, he instituted an investigation. He found that Maxey Collins had never executed a relinquishment of his homestead entry, nor authorized any one to do it for him; in other words, that the alleged relinquishment was fraudulent. Thereupon Reitober, on March 13, 1894, relinquished his entry, and the same was canceled.

The above particulars are set out in a corroborated affidavit filed by Reitober, and transmitted to your office on October 4, 1894. Reitober at the same time made application for second entry, accompanied by a formal application for the SE. $\frac{1}{4}$ of Sec. 32, T. 25 N., R. 8 W.

In view of Reitober's allegations and the showing made by the records, your office, on January 23, 1895, allowed him the privilege of making a second entry in accordance with his application. There is nothing in the record, however, to show that any further action was taken in this matter.

On March 5, 1895, there was transmitted to your office the application of Reitober for repayment of the fees and commissions paid on his homestead entry for the SW. $\frac{1}{4}$ of Sec. 31, T. 22 N., R. 5 W.

On March 13, 1895, your office denied said application for repayment on the ground that

the records of this office do not show that this entry was erroneously allowed nor was it canceled for conflict, but it appears that the entryman voluntarily relinquished his entry.

From this decision the claimant has filed an appeal, wherein direct issue is taken with the findings of your office both as to the specification of voluntary relinquishment on his part and that his entry was not erroneously allowed.

There may be a question as to whether claimant's relinquishment was voluntary or not in view of the fact that it was prompted by the discovery that the purported relinquishment by Collins was fraudulent. Reitober knew that so long as Collins had not actually relinquished his entry, his own entry was illegal. The fact that the local office canceled Collins's entry upon the presentation of his alleged relinquishment, did not serve to deprive Collins of any rights he may have had, nor transfer them to Reitober. To the extent of knowing of and being influenced by these things it may be contended that Reitober's relinquishment was not voluntary.

The main question, however, is whether from any cause, claimant's entry was "erroneously allowed and could not be confirmed," and therefore brought within the remedial provisions of the act of June 16, 1880 (21 Stat., 287).

The definition of the phrase "erroneously allowed" as given in the general circular issued by the Land Office is as follows:

This cannot be given an interpretation of such latitude as would countenance fraud. If the records of the Land Office or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." But if a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was "erroneously allowed"; and in such case repayment would not be authorized.

It can hardly be claimed that the conditions of the case at bar bring it under the second illustration given above. The land in question was not subject to entry at the time Reitober made his entry, and the presentation of a fraudulent relinquishment did not make it so. It is true the local office did not know these things at the time the entry was allowed, but it would be a rather narrow construction to say that this Department cannot take advantage of the facts and circumstances which were subsequently developed in the case. In the light of those circumstances it transpired that the entry ought not to have been permitted; hence, it may properly be said that it was "erroneously allowed."

In view of the fact that Collins had never surrendered his entry I think it may be held that Reitober's entry was "erroneously allowed," although it was not due to any error on the part of the local office.

The tendency of departmental decisions has been to rather restrict the phrase "erroneously allowed" to mean an error committed by the government and not error made by the entryman himself. This construction of the statute is probably somewhat narrow. In the case of Duthan B. Snody (1 L. D., 532) it was stated:

You say in your decision that "there was no error on the part of the government in allowing the second entry," and seem to assume that in order to afford the relief

provided for in the act the error must always be one committed by the government. I think such construction is too narrow. The statute says, "where *from any cause* the entry has been erroneously allowed". . . . The statute is one of remedies, and remedial statutes "are to be construed liberally and beneficially, so as to promote as completely as possible the suppression of the mischief intended to be remedied, and to give life and strength to the remedy." (Maxwell, 203.) The fact that the acts of the entryman have contributed to or caused the erroneous entry ought not, under the statute, to deprive him of the remedy in cases where he has acted in good faith.

Subsequently, in the case of Arthur L. Thomas (13 L. D., 359) the Department held that the above opinion was somewhat broad, and it was decided that said opinion would have been more complete had the important words "and cannot be confirmed" been added thereto; then it would read, "where from any cause the entry has been erroneously allowed, *and cannot be confirmed.*" This is apparently the correct holding, for the reason that the law does not contemplate repayment of fees and commissions in cases where it is possible to confirm the entries. It will thus be seen that the words of the statute are interdependent upon each other, and that in order to properly dispose of applications coming thereunder, it is necessary to consider them together.

In my opinion, if as appears in this case, a relinquishment was innocently procured, and on its presentation at the local office an entry was allowed, under the mistaken belief, entertained by the entryman and the officers allowing the same, that it was a bona fide relinquishment, when in truth it was fraudulent, then the entry was "erroneously allowed" in the meaning of the statute, and the entryman is entitled to repayment of his fees and commissions; especially is this true since confirmation of the entry is impossible.

Your office decision is accordingly reversed, and the repayment of the fees and commissions paid by Reitober on the SW. $\frac{1}{4}$ of Sec. 31 is hereby directed.

ANDRUS ET AL. v. BALCH.

Motion for review of departmental decision of February 21, 1896, 22 L. D., 238, denied by Secretary Smith, May 23, 1896.

RAILROAD GRANT-INDEMNITY SELECTION-RESERVATION.

NORTHERN PACIFIC R. R. CO. v. BEAN.

An indemnity selection of lands embraced at such time within a reservation for a reservoir site is inoperative; and the subsequent release of said lands from such reservation will not inure to the benefit of the prior selection.

Secretary Smith to the Commissioner of the General Land Office, May 23, 1896. (P. J. C.)

The land in controversy is the NW. $\frac{1}{4}$ SE. $\frac{1}{2}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lots 1 and 2, section 13, T. 18 N., R. 7 W., Helena, Montana land district, and is within the indemnity limits of the grant to the Northern Pacific Railroad Company.

November 9, 1891, the company filed indemnity selection list in the Helena land office for the whole of said section, "which was rejected by the local officers for the reason that all of said section had been reserved for reservoir purposes under the act of October 2, 1888." The company appealed.

February 23, 1895, Ernest F. Bean filed an application in the local office for a hearing, and in his corroborative affidavit sets forth that he settled upon the land in the spring of 1877, prior to the survey thereof; that he has made valuable improvements on the same and raised crops for five years, and states that he desires to procure title thereto under the settlement laws.

This application was forwarded to your office with the recommendation by the local officers that the same be granted, and your office by letter of May 9, 1895, rejected the application of the railroad company to make selection of the tract, and decided that no hearing was necessary in the case and that Bean would be permitted to make entry of the land. From that decision the railroad company appealed, upon the ground that it was error to hold that the tract was not subject to selection by said company, because the same was selected as the site for an irrigating reservoir and withdrawn from entry by order of the Secretary of the Interior.

It is stated in your said office decision that the records of your office show that all of this section was selected as a site for an irrigating reservoir and withdrawn by the Secretary's order from entry or filing to take effect July 19, 1889. It was restored to the public domain November 13, 1891. It will thus be seen that at the time the company filed its application to select this tract it was in a state of reservation, and it was therefore not subject to selection by the company. It is urged that this was but a temporary reservation and that it should not operate to defeat the right of the company when the tract was restored to the public domain. This position is, in my judgment, untenable. It is analogous, I think, to the case of an Indian reservation. It was decided in *Atlantic and Pacific R. R. Co. v. Willard* (17 L. D., 554), syllabus:

Lands embraced within the Camp Verde Indian reservation at the date of the definite location of the road are excepted thereby from the operation of the grant, and the subsequent release of said lands from such reservation will not inure to the benefit of the grant.

Your office judgment is therefore affirmed, and Bean will be permitted to make entry of the land if otherwise qualified.

ENSTROM *v.* HART.

On motion for review the departmental decision of May 21, 1894, 18 L. D., 486, is recalled and vacated in view of the Supreme Court decision in the case of the Wisconsin Central R. R. Co. *v.* Forsyth, 159 U. S., 46, and remanded for action in accordance therewith. See decision of Secretary Smith, May 23, 1896.

CONTEST—EVIDENCE—RESIDENCE—APPLICATION.

DESMOND *v.* JUDD ET AL.

In a contest, wherein the truth of final proof is in issue, it is proper and necessary to examine said proof, and compare the statements therein made with the facts established at the hearing.

After the establishment of residence in good faith, temporary absences will not be held to show abandonment, but in such case the claimant must evince by his acts an honest continuing intention to maintain a permanent residence, and make the land a home to the exclusion of one elsewhere.

The case of *Smith v. Malone*, 18 L. D., 482, cited and distinguished.

Secretary Smith to the Commissioner of the General Land Office, May 23, 1896. (W. C. P.)

I have considered the case of *George E. Desmond v. Benjamin F. Judd et al.*, on appeal by the former from your office decision of December 24, 1894, dismissing his contest against Judd's commuted homestead entry for the NW. $\frac{1}{4}$ of Sec. 19, T. 49 N., R. 9 W., Ashland, Wisconsin, land district.

Judd made homestead entry for said land February 23, 1891, and commuted the same to cash entry, the certificate bearing date of July 17, 1893, final proof submitted February 28, 1893.

A contest between these parties as to their claims to this land was decided in Judd's favor by your office on May 19, 1892, and Desmond's appeal therefrom was dismissed by this Department on January 7, 1893, because not filed within the time prescribed by the Rules of Practice. A motion for review of this action was denied July 7, 1893 (17 L. D., 68).

On February 28, 1893, Judd submitted final proof under his entry, which was held to await the determination of the contest then pending between the parties. On July 17, 1893, after departmental decision above referred to, denying the motion for review, but before official notice thereof had been sent to the local office, Judd's final proof was approved, he made payment for the land, and final cash certificate was issued to him.

On October 9, 1893, Desmond filed in the local office his affidavit, alleging that on the day set for submission of Judd's final proof he appeared at the local office and filed a formal protest and also an affidavit of contest, asserting that Judd

was seeking to obtain title to said land through fraud and misrepresentation; that he never established an actual residence on said land; that he has abandoned the same for more than six months prior to the date of making final proof, and that during all the time of his alleged residence on his homestead, he was in fact a resident of the city of Ashland, Wisconsin, where he was engaged in business.

He further stated that he then asked for a hearing, and was informed by the register that Judd's proof would not be accepted, and that a hearing would be ordered, but that he has just learned that said proof

had been accepted, and final certificate issued, his affidavit having been disregarded. He reasserted the truth of these allegations and asked for a hearing. With this last affidavit, three others were filed corroborating the statements made. Upon receipt of these affidavits your office ordered a hearing.

At this hearing both Judd and Desmond were represented as were also certain parties claiming title to said land by virtue of a deed from Judd, executed October 11, 1893.

The local officers decided that the entry should be canceled, but upon appeal this decision was reversed by your office, and the entry held intact.

It was correctly held by you that the contention of Judd's transferees that this Department has no jurisdiction to cancel said entry after the conveyance to them as innocent purchasers cannot be sustained. (*Bender v. Shimer*, 19 L. D., 363).

The local officers in their decision refer to the final proof and point out discrepancies between the statements there made and those made at the hearing by the witnesses for the defendant. You held this to be wrong, saying—"the final proof aforesaid should not have been considered by you, and will not be considered by this office;" and citing in support of this conclusion *Foltz v. Soliday* (13 L. D., 663). In that case the entryman sought to have the statement of his witnesses on final proof considered as a part of the testimony in his behalf at a hearing on a protest. This was denied. The reason for this rule is the elementary proposition that *ex parte* statements cannot be considered as testimony in a contest case.

Where the record contains *ex parte* statements, made under oath by one who afterwards appears as a witness in a contest such statements may be properly considered for the purpose of comparison with his testimony to determine his credibility and the weight to be given that testimony. In this case the truth of the final proof was attacked, and to determine the issue presented by this attack, it is not only proper, but absolutely necessary to examine that proof and to compare the statements made therein with the facts established by the testimony submitted at the hearing. This is what the local officers did, and hence there was no error on their part in this particular.

The testimony in this case is conflicting, and many points are left in doubt that should have been clearly shown. Judd went on this land in August, 1890, and was there for short periods at longer or shorter intervals from that time until the date of his final proof, February 28, 1893. He erected during the first year a log house, stable and root house, and cleared about an acre of the land. The second year he cleared some additional land. This is the extent of his improvements, and they are valued at from \$100 to \$500, this last being clearly excessive, and the weight of the evidence making said improvements worth perhaps \$200. It was shown that the timber he removed was worth about

as much as his improvements were. In the season of 1891 he planted a small plat of ground in potatoes and other vegetables. In the season of 1892 he again planted a small plat in vegetables, but harvested nothing. He had in his house a bed and bedding, stove, tables, dishes and cooking utensils, all of which were of little value, but are described as being sufficient for the housekeeping of an unmarried man. During a portion of the time he had a milch cow on the place. This constitutes the whole showing made as to his connection with this land, except as to the point of the time of his actual presence there. From May, 1892, until final proof, he visited the place three or four times, remaining as many days each time. Great stress is laid upon the fact that Judd voted in the fall of 1892 in the election precinct in which said land is situated, as showing it to be his place of actual residence. This fact may be properly considered, but it is not conclusive. It is impossible to determine how much time Judd was actually present upon the land, but it is clear the time spent there subsequently to the spring of 1892 was in the nature of visits. What he did shows only a studied effort to do only what he considered essential to making a showing of compliance with the requirements of law rather than an honest intention of maintaining a home upon the land. From about the time of the decision of your office of May 18, 1892, in the former case in his favor, he virtually abandoned the place as a residence. He did not make any attempt to care for or harvest the crops he claims to have planted that spring and his visits there were infrequent and of short duration. It is true that after a residence is once established in good faith by a homestead claimant, temporary absences will not be held to show an abandonment, but his acts must evince an honest continuing intention to establish and maintain a permanent residence, to make the land a home to the exclusion of all others.

Judd's acts do not, in my opinion, come up to this standard. The local officers had the witnesses whose testimony is material before them, and were able to judge of the weight to be given their respective statements, and their conclusion as to the question of fact is entitled to consideration.

The timber on this tract is quite valuable, and shortly after receipt of final certificate Judd sold the land to parties engaged in the lumber trade for the consideration of \$7,500, and they immediately proceeded to remove the timber. This furnishes a clue to Judd's motives in attempting to procure title to this land.

After careful consideration of the record in this case, I am of opinion that Judd did not in good faith maintain his residence on this land as required by the homestead law, and that his entry should be canceled.

A decision was reached in this case on March 16, 1896, directing the cancellation of Judd's entry upon the grounds that the preliminary affidavit was executed prior to the date upon which the land became subject to entry, such ruling being based upon the decision in the case

of *Smith v. Malone* (18 L. D., 482). Upon further examination, I have found that the case under consideration is not governed by the one cited. The land involved here lies within the limits of the grant for the Wisconsin Central Railroad and forfeiture thereof was declared by the act of September 29, 1890 (26 Stat., 490). Section 2 of said act provided that actual settlers upon the land, thus forfeited, at the date of such act, should be entitled to a preference right to enter the same under the homestead law to be exercised within six months, and that they should be regarded as settlers from the date of original settlement or occupation. This is a condition materially different from that of the lands involved in the case of *Smith v. Malone*, where a prohibition existed against the attempt to acquire any right or claim prior to their formal opening to settlement. Said decision in *Smith v. Malone* has no application to this land, and the decision of March 16, 1896, is hereby recalled, revoked and set aside.

The decision appealed from is reversed.

NORTHERN PACIFIC R. R. Co. *v.* COBERLY.

Motion for review of departmental decision of March 6, 1896, 22 L. D., 264, denied by Secretary Smith May 23, 1896.

RAILROAD GRANT—LANDS EXCEPTED—EVIDENCE.

NORTHERN PACIFIC R. R. Co. *v.* MOORE.

The right of a railroad company to a specific tract of land should not be determined by an adverse ex parte showing, and the testimony taken in another and independent case involving a different tract of land.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (W. A. E.)

I have considered the case of the Northern Pacific Railroad Company *v.* Thomas Moore, involving the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 13 N., R. 18 E., North Yakima, Washington, land district, on appeal by the former from your office decision of March 21, 1895, holding said tract to have been excepted from the grant to said company.

This tract is within the primary limits of the grant of said company upon its branch line, as shown by the map of definite location filed May 24, 1884, and was also embraced within the limits of the withdrawal upon the map of amended general route of said line, the map showing which was filed June 11, 1879.

September 22, 1886, Thomas Moore made timber culture entry for said tract, and on October 13, 1894, final certificate was issued.

By letter of December 22, 1894, your office directed the register and receiver to call upon Moore to show cause why his entry should not be canceled for conflict with the railroad grant.

In response to said rule to show cause, the entryman filed several affidavits tending to show that about March 4, 1878, one Owen Munson filed pre-emption declaratory statement for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ (the tract in controversy) and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 15; that Munson afterwards sold his improvements on the land to one N. C. Walters, who, in turn, sold them to George C. Thomas in 1881, that Thomas immediately took possession of the land and tendered his timber application for it, which was refused by the local officers on the ground that this was railroad land; that at the time Thomas tendered said timber culture application he filed pre-emption declaratory statement for an adjoining tract of one hundred and sixty acres on which he lived; that on May 24, 1884, the time of filing map of definite location, he was occupying and cultivating this land in connection with his pre-emption claim; that Thomas was on May 24, 1884, qualified to enter said land under the homestead law; that he afterwards sold the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section to Thomas Moore, the present entryman; and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ to George F. Bullock, who, in turn, sold the last-named eighty acres to John C. McCrimmon; that in the case of the Northern Pacific Railroad Company *v.* John C. McCrimmon, decided by the Department on May 13, 1893 (L. and R. 266, p. 456; see also 12 L. D., 554), it was held that the tract claimed by McCrimmon was excepted from the operation of the withdrawal on general route, and that the occupancy of Thomas, existing at date of definite location, excepted said tract from the operation of the grant; that the decision in the McCrimmon case is conclusive of the issues involved in the present case; that the railroad company has no right to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section; and that Moore's entry should be passed to patent.

March 21, 1895, your office rejected the railroad company's claim, and held Moore's entry intact.

From this action the company has appealed.

It is urged on behalf of the company that your office erred in basing a decision solely upon ex-parte affidavits and testimony taken in another and independent case, without giving the company an opportunity to be heard in the present case.

This point seems to me to be well taken. No hearing has ever been ordered in this case; the ex-parte affidavits filed by Moore certainly can not be considered as evidence; and the McCrimmon case was an entirely independent matter. Not only are the parties different in the two cases, but the tracts are different. McCrimmon was an applicant for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 15, and it only appeared incidentally in the trial of the former case that the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the section (the land here involved) was also occupied by Thomas at the date of definite location.

You will, therefore, instruct the register and receiver to order a hearing upon the questions here involved, and give due notice thereof to both parties. The case will then be re-adjudicated in accordance with the law and the evidence.

Your office decision is so modified.

DAVISON *v.* ALTON ET AL.

Motion for review of departmental decision of March 27, 1896, 22 L. D., 398, denied by Secretary Smith, May 23, 1896.

MINING CLAIM—ADVERSE INTEREST—PROTEST—NOTICE.

GOWDY ET AL. *v.* KISMET GOLD MINING CO.

An allegation by a protestant against a mineral application that the location, on which said application rests, is void, for the reason that it is made on land covered by the prior location of the protestant, presents an issue that must be determined by adverse judicial proceedings; and, on the failure of the protestant to so protect his interest, the Department can afford him no relief, if there has been substantial compliance with the law, in the matter of notice, on the part of the applicant.

The shaft house on a lode claim is a proper place for posting a notice of application for mineral patent.

The notice of a mineral application, as posted and published, in addition to other details, should state the names of the nearest or adjacent claims, and where the record of the claim may be found.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (P. J. C.)

The record shows that on August 21, 1893, C. H. Barnes *et al.* made application for patent for the Kismet lode mining claim, survey No. 8868, Pueblo, Colorado, land district. During the period of publication the protest and adverse claim of the Big Chief were filed, and suit instituted in support thereof. After the period of publication had expired, and on February 7, 1894, W. H. Gowdy *et al.* filed a protest against the entry, alleging ownership of the Chicago Girl lode, and that it conflicts with the Kismet; that the notice of application for patent was not posted in a conspicuous place on the claim, and that the published notice did not contain the names of adjoining claims. No action seems to have been taken by the local officers on this protest.

The Kismet Gold Mining Company, in whom the title had meantime vested, on July 14, 1894, relinquished and abandoned a part of the Kismet claim. The suit brought in support of the adverse of the Big Chief was dismissed July 30, 1894.

August 1, 1894, Gowdy *et al.* filed another protest, substantially the same as the first. A motion was made August 10, to dismiss the protest on the ground that the allegations were insufficient on which to

order a hearing. This motion must have been sustained, for the reason that on the application to purchase, filed October 4, 1894, mineral entry No. 492 was on that day made of the Kismet, and subsequently the protestants appealed.

Your office, by letter of March 9, 1895, dismissed the appeal, because the same had not been properly served on the applicant. Additional protests, filed by the same parties, making substantially the same charges, were also dismissed by said letter, and by letter of May 6, 1895, motion for review of former decision was denied.

Subsequently, attorneys for the protestants filed "a paper which is at once a motion for review of said office decision of May 6, 1895, a supplemental protest under oath, and an argument in support of protestants' contention." This was overruled, by letter of May 27, 1895, whereupon the protestants prosecute this appeal, assigning numerous grounds of error, which may be reduced to the following: (1) that the Chicago Girl being the prior location, that of the Kismet covering substantially the same territory was void; (2) that the Kismet application for patent was not posted in a conspicuous place on the claim, and (3) that the publication notice was insufficient, in that it did not state where the record of the Kismet could be found, or give the number of feet claimed in each direction from the point of discovery, or the names of adjoining claimants on the same or other lodes, or the names of the nearest claims.

It is not charged by the protestants that they did not have notice of the application for patent. All they claim is that some of the claimants of the Kismet assured some of them "that they were not claiming and would not claim any portion of the ground in conflict," and relying upon this verbal promise they did not protect their interest by adverse proceedings. If it be granted that such assurances were made, this would not excuse the protestants from taking the course prescribed by statute for their own protection.

In the absence of any showing to the contrary, when publication and posting have been made, the Department must assume that all adverse claimants had notice thereof, and if they fail to protect their interests, the Departments cannot relieve them, when there has been a substantial compliance with the law as to the notices.

The statute provides:

If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

In the case of *Wright v. Dubois* (21 Fed. Rep., 693), Mr. Justice Brewer, commenting on this particular portion of the statute, says:

"It shall be assumed that no adverse claim exists." By whom assumed, for what purpose, and to what extent? By the government, the owner of the land, the party offering it for sale; in order that the claims of all other parties to the land and the

benefit of the owner's offer be presented and determined, and that thereafter the government may deal with the applicant alone, inquiring simply whether he has performed the prescribed conditions; and conclusively assumed. The proceedings before the land department are judicial, or *quasi* judicial, at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. . . .

But it is said by counsel that, under the last clause of the statute quoted, any person may object that the applicant has failed to comply with the terms of the chapter; and why should they not have the same privilege as strangers? Have they forfeited this right by failing to adverse? It becomes necessary to see what rights this last clause gives. I think all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiae*,—a friend of the court,—to suggest that there has been error, and that the proceedings be stayed until further examination can be had.

The question, therefore, as to whether or not the location of the Kismet was void is one that cannot now be considered by the Department. It is a question that is exclusively within the jurisdiction of the local courts to be tried under the adverse proceedings provided for by section 2326 of the Revised Statutes. It is a question of fact that forms the very foundation of the possessory title to the land, and must necessarily be determined in the manner provided by statute.

The only matter that the Department can determine in this proceeding is as to whether the notice was posted on the claim as required by law and the rules, and whether the publication notice is in conformity therewith. And this is solely a matter between the government and the entryman.

The protest is only to the officers of the government, challenges only the applicants' claims, and in no manner brings up for consideration any claims of the protestant. (*Wright v. Dubois, supra.*)

It is admitted by the protestants that the notice of application for patent was posted on the shaft house of the Kismet lode. The charge is that it was not on the most conspicuous side of the shaft house, that it was on the west side, and it could have been more easily seen if it had been on some other. There is no merit in this charge. The shaft house is certainly the most conspicuous object on a mining claim, especially where, as in the case at bar, there were no other improvements. Aside from this, it is shown by the affidavit of the deputy-surveyor, who assisted in posting it, that it was placed where it was plainly in view of every one approaching the claim, and it was put on the west side because there would be no obstruction on the building to hide it on that side, whereas if it had been placed on the front, the doors, when opened, would have obscured it. The distinction between this case and that of *Ferguson et al. v. Hanson et al.* (21 L. D., 336), on this particular point, is: in that case it was found as a matter of fact that

there had been "a studied effort on the part of the applicants to avoid a compliance with the law in posting the notices in a conspicuous place on the land."

Paragraph 29 of the Mining Circular, approved December 10, 1891, reads:

The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and, if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc.

Then follows paragraphs in regard to posting, etc., and in relation to the publication of notice. Then this:

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

The law and the regulations thereunder in regard to giving notice of application for patent of mining claims is much more elaborate than in any other class of the public lands; and the reasons for this can be readily understood when it is remembered that mining claims are very often located in regions remote from settlements, where but few people are to be found at any time, and, perhaps, none reside permanently until the claims are developed, their value established, and by reason thereof the locality becomes populated with those seeking the riches of nature, or to engage in trade and traffic, mechanics and miners, all brought together simply by reason of the mines. It is a matter of common knowledge that the precious metals are invariably found in the mountain regions, where the rigors of the climate and the general environment are such that until there becomes a settled population, with means for comfortable living and transportation, persons do not remain any longer than it is necessary. In such sparsely settled "mining camps," as well as in the older and more densely populated districts, applications for patent for mining claims are made, and it was the intention of the law and rules that every means known, and by every device that could be suggested, full and adequate notice should be given to the world of the application, and that those seeing the notices, whether posted or published, might from the contents thereof locate the claim. Hence all these details required by the paragraph quoted. The names of adjoining or of the nearest claims might enable a party interested to identify the claim applied for, when by nothing else in the notice he could do so. The notice should state where the record of the claim can be found, for the reason that the location may

be recorded in the records of the mining district, if there be one, or in the recorder's office of the county where the claim is situated.

The published notice in this case does not comply with either of these requirements. The only information this notice would convey to the mind of any person watching for patent applications is that the Kismet is situated "in Cripple Creek mining district, county of El Paso, State of Colorado," and that corner No. 1 bears a certain course and distance from a given quarter-section corner. It is quite evident, therefore, that this notice is not in strict conformity with the rules, and it is doubtful if any persons interested in mining property in the locality of the Kismet, if they had seen this notice, but were not familiar with the name of the claim, would have had sufficient notice to put them on inquiry.

It should be borne in mind that there is no limit to the time that a mining claim must be located before application for patent may be made. It may be located on one day and official survey applied for the next. For instance, in the case at bar the Kismet was located May 23, 1893; the official survey was completed June 19, and application for patent was made August 21, following, and on the last date there had not been \$500 worth of work done or improvements placed on the claim, according to the return of the deputy-surveyor. Now, the mining law does not require the locators of a claim to remain in the actual physical possession of it all the time, as does the homestead law, for instance; they are only required to do work annually, to the amount of \$100. So it is not at all improbable that the owners of conflicting claims might have no knowledge of the location of the Kismet, and simply calling it by that name in the notices posted and published, without giving the names of adjoining claims, or of those nearest it, would not convey to any one any accurate idea of its locus.

It is true that the deputy-surveyor did not note adjoining claims or those nearest it. But this was a plain neglect of his duty, if there were claims in the vicinity, and if there were none, that fact should have been stated. This is a matter that the applicant also, if he is acting in good faith, should give his attention to and see that adjoining claims are included in the notices. It would seem as if it were primarily his duty to give this information, as his knowledge in regard thereto would necessarily be superior to that of the surveyor, especially if the latter was not familiar with that particular locality.

I am strongly impressed with the belief that the notices published and posted in this case are not in substantial compliance with the rules, and that there should, therefore, be new publication and posting, in making which the rules should be strictly followed.

Your office judgment is therefore reversed, and the entry will be suspended pending republication and posting.

PRACTICE—PROTEST—CORROBORATION.

STATE OF MONTANA *v.* BAYLISS.

A protest filed by a State against the allowance of an entry should be corroborated, in accordance with the requirements of Rule 3 of Practice.

Secretary Smith to the Commissioner of the General Land Office, May 23, 1896. (R. F. H.)

The State of Montana by its Attorney General appeals from your office decision of April 18, 1895, dismissing the protest of the State against the mineral entry No. 3091 of Rawlinson T. Bayliss for Prospect Lode, situate in part on section 36, T. 12 N., R. 6 W., Helena land district, Montana, upon the ground that the protest was not corroborated as required by rule 3 of practice.

While a protest which attacks the record should be sworn to (See Instructions of Commissioner McFarland, of January 31, 1883, 1 L. D., 86), yet the absence of verification is not fatal, (See *Baker v. Briggs*, 15 L. D., 41), it being within the discretionary power of the Commissioner to order a hearing on an informal protest, if it bears upon the validity of the entry. (See *Blakely v. Kaiser*, 12 L. D., 202). So also it is not error to dismiss a protest, which fails to satisfactorily show the invalidity of the entry, or if not corroborated or verified. (See case of *Hopely v. McNeill*, 17 L. D., 108).

I am aware of no statute or rule, and none is cited by appellant, which excepts a State from the operation of the general rule of practice, in the matter of protests; and it is contrary to good practice and the just rights of claimants to permit the record of their entries to be attacked by the unsworn statement of any party, whether a private individual, a private corporation, or a State.

I am of opinion that the assignments of error are not well taken, and the decision appealed from, as modified by your office decision of July 17, 1895, is accordingly affirmed.

GARDNER ET AL. *v.* WELSTEAD ET AL.

Motion for review of departmental decision of February 17, 1896, 22 L. D., 194, denied by Secretary Smith, May 23, 1896.

MINING CLAIM—ADVERSE PROCEEDINGS—STAY OF ACTION.

LITTLE GIANT LODE.

Where a mineral applicant institutes adverse judicial proceedings against a subsequent applicant, whose claim in part involves the same land, there should be a stay of action until final disposition of the suit at law.

Secretary Smith to the Commissioner of the General Land Office, May 23, 1896. (A. E.)

This is an appeal from your office decision of May 2, 1895, holding that the order suspending action on the mineral entry No. 285, made

December 31, 1889, by Harvey Young *et al.*, for the Little Giant lode claim, Glenwood Springs, Colorado, could not be revoked and action taken while a suit in court was pending.

It appears from the papers in the case that action on said application was suspended October 24, 1890, until evidence was furnished showing the determination of a suit at law brought by the claimants against another and subsequent claim, known as the Teaser lode claim, and involving part of the same land. At the time of the suspension this suit was pending in a court of competent jurisdiction.

Appellant contends that the suspension should be revoked and the entry approved for patent. To sustain this, it refers to the fact that the suit in court was not brought against the Little Giant Lode, but by it against the Teaser Lode, and that therefore the case is not governed by section 2326 of the Revised Statutes; that section 2326 only applies to cases where an adverse claim is filed against the original applicant, and that in this case no such claim was ever filed or suit brought by the Teaser Lode against the Little Giant Lode.

This is a peculiar case, and while the facts may not bring it within the letter of section 2326 of the Revised Statutes, such facts as the record shows would appear to warrant your office in suspending action until evidence is furnished showing that the suit at law has been disposed of.

Your office decision is therefore affirmed.

MCINNES *v.* COTTER ET AL.

Petition for re review of departmental action herein, denied May 23, 1896. See 21 L. D., 97, 303.

APPLICATION TO ENTER—RULE 66—RECORD.

SHELDON *v.* ROACH ET AL.

The failure of an applicant for a tract of land to appeal from adverse action of the local office will not be held to prejudice his rights, where such action is not endorsed on the application, and the applicant notified of his right of appeal. Parol evidence may be accepted to show facts which should have appeared of record, and would have so appeared but for the omissions of the local office.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (E. B., Jr.)

The land involved in this case is the SW. $\frac{1}{4}$ of Sec. 18, T. 1 S., R. 6 W., S. B. M., Los Angeles, California, land district. The parties are Daniel F. Sheldon *v.* Isaac N. Roach and the Southern Pacific Railroad Company. The land was formerly entered as a homestead by one Barnett G. Cezar, but the entry was canceled under the decision of the

Department of January 23, 1892, in the case of *Stevens v. Cezar*, unreported. Applications, as shown by the records of the local office, were presented by the said parties as follows:

Isaac N. Roach, February 29, 1892, to enter the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section as a homestead;

The Southern Pacific Railroad Company, March 7, 1892, to select the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section under the act of June 22, 1874 (18 Stat., 194), in lieu of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, T. 2 S., R. 5 W., S. B. M., relinquished; and

Daniel F. Sheldon, March 30, 1892, to enter said SW. $\frac{1}{4}$ of Sec. 18 as a homestead.

These applications were each formally rejected by the local office on the same ground, to-wit, that the entry of Cezar still remained intact of record, the time within which he might apply for review of the said departmental decision not having expired. Each of said applicants duly appealed. The Department subsequently denied Cezar's motion for review of its decision above mentioned. Stevens never sought to exercise his preference right of entry thereunder.

In view of the affidavit filed by said Sheldon August 25, 1892, and in due course of proceedings before your office, not necessary to recite here, a hearing was held February 16, to March 1, 1893, and upon the evidence adduced the local office decided the question of priority of right to the land in favor of Sheldon, on the ground that he was the first applicant therefor. This decision was reversed by your office decision of April 2, 1895, wherein it was held that as to Roach and Sheldon the evidence did not show settlement and residence in good faith by either of them prior to filing their respective applications, that the question of priority between all the parties must be determined by priority of application alone, and that the several applications were entitled to consideration in the order shown by the records of the local office, thus preferring the applications of Roach and the Railroad Company to that of Sheldon. From this decision Sheldon duly brings his appeal, his contention being that he was the first applicant for the land.

In his affidavit above mentioned Sheldon alleges that on February 8th, and again on February 23, 1892, he presented an application to enter the tract in controversy, which application the register declined to receive, in the first instance on the ground that it was premature, inasmuch as he had received no official notice of the cancellation of Cezar's entry, and in the second on substantially the same ground as was given for the subsequent formal rejections of the several applications of the parties.

At the hearing Sheldon testified that he made a personal examination of the land on February 7, 1892, and on the following day, and again on the 23rd of the same month, personally presented his homestead application to the register at the land office, with the result stated in his said affidavit. Deponent Ewing, a farmer living near the

land, corroborates Sheldon as to his visiting the land February 7th. No notation of Sheldon's offered application and its rejection appears to have been made on the office records, nor any endorsement to that effect upon the application itself, as should have been done in such case. In their decision dated March 18, 1893, the local officers state:

The tender of Sheldon's application on a date prior to that of Roach is in accordance with the recollection of the register of this office. His recollection in this regard is clear and distinct and is that Sheldon applied to file upon the land a very considerable time before Roach's application was offered. At the time Sheldon so applied to file, no official information had reached this office of the decision of the Hon. Secretary in the case of *Stevens v. Cezar*, and, the land not being open to entry, Sheldon was informed by the register that his application was premature.

Your said office decision admits that Sheldon did present an application to enter the land prior to that of Roach, but proposes to deprive him of any benefit thereunder on the ground that he acquiesced in the refusal of the register to entertain his application and thereby "lost whatsoever right he might have otherwise acquired by the presentation of this application." I do not concur in this premise nor conclusion. Sheldon's failure to appeal from such refusal, which is the only foundation for the premise, was not, under the circumstances, an acquiescence in the denial of his right. He had no attorney at that time nor until in August following. He was entitled to presume that in such a matter the register knew what was the proper course, would act in good faith, and would not give him erroneous information or instruction. His subsequent inquiries at the local office concerning the status of the land, his subsequent attempts to file an application therefor, and his actual presence in a tent thereon from about March 28th to April 4, 1892, all go to show a steady intention to homestead the tract.

The cancellation of Cezar's entry released the land at once from appropriation (*McDonald et al. v. Hartman et al.*, 19 L. D., 547). Sheldon's application should have been received subject to the exercise by Stevens of his preference right. It was the duty of the register, under Rule 66 of Practice, to have made proper endorsement on Sheldon's application and to have advised him of his right of appeal. Being unadvised in the premises, Sheldon should not be prejudiced in any of his rights by failure to appeal from the adverse action of the register in February, 1892, within thirty days as usually required. The first formal notice of action adverse to him appears to have been given after the rejection of the application filed March 30, 1892, and from this he duly appealed. By this appeal he saved all the rights he ever had under his original application, which the evidence shows was duly presented for filing prior to that of either Roach or the Railroad Company.

That it was competent by parol evidence to supplement the record so as to show facts which should have appeared therein, and would so have appeared but for the omissions of the local office, see the cases of *Mallet v. Johnston*, 14 L. D., 658; *Charles S. Phillips*, 17 Id., 53; *Fredrick Tielebein*, Id., 279; and *McDonald et al. v. Hartman et al.*, *supra*.

Although the question of priority of settlement as between Sheldon and Roach is not directly in issue under the appeal, inasmuch as it is insisted by Roach in argument that he made settlement prior to Sheldon, I deem it proper to say that upon careful examination of the evidence I concur in the conclusion reached by both the local office and your office that neither of these parties settled and established a residence on the land prior to his application.

Your said office decision is reversed in accordance with the foregoing. Sheldon will be given thirty days from notice hereof within which to make homestead entry of the land.

GRIFFARD ET AL. *v.* GARDNER.

Motion for review of departmental decision of October 1, 1895, 21 L. D., 274, denied by Secretary Smith, May 23, 1896.

HOMESTEAD CONTEST—SETTLEMENT RIGHT—ENTRY—RESIDENCE.

WILLIAMS *v.* GENTRY.

In the case of an attack upon a homestead entry, by one alleging priority of settlement, where the entryman sets up his own settlement in defense he must show that his initial acts of settlement were maintained and followed up by residence established within a reasonable time.

Secretary Smith to the Commissioner of the General Land Office, May
(W. A. L.) 23, 1896. (C. J. W.)

On the opening of the Iowa country September 22, 1891, Willy Williams and William Gentry entered the race for land, starting on the line about one and a half miles from the land in dispute, NE. $\frac{1}{4}$ of Sec. 17, T. 15 N., R. 1 E. Willy Williams made the race on foot carrying a gun, an ax and a quilt, and reached the land in dispute in about fifteen minutes, and immediately went to work on it, stopping on the SE. corner. Gentry was on horseback, and made the race in about ten minutes, stopping temporarily on NE. corner of the land in question, but out of sight of Williams. He said to those with him when he stopped, "I claim this." He hitched his horse and walked away. He and two other parties slept very near the line, but on the corner of the claim in dispute that night. Gentry saw Williams on the claim at work late in the evening. September 28, 1891, Gentry filed on the land. October 10, 1891, Williams filed affidavit of contest, alleging that he was the first legal settler upon the land and had made valuable improvements, and that Gentry settled on Sec. 8 and not on the land he filed on.

A hearing was ordered, and on August 17, 1894, the local officers rendered a decision in which they found that Gentry was the first settler,

and dismissed the contest. Williams appealed, and on January 26, 1896, your office affirmed the finding of the local officers. Williams again appealed, and I have the same now before me.

The length of time between the ordering of the hearing and the hearing on August 17, 1894, is unexplained.

Upon examination of the record, I am unable to reach the same conclusions reached by your office. The local officers and your office concurred in finding, that Gentry reached a corner of this land before Williams did, and this will be considered as correctly found. There is no distinct finding of fact as to any act of settlement performed by Gentry on the land on the 22d, and it would seem that Gentry's verbal announcement to two parties who were with him, that he "claimed this," was treated as an act of settlement which would bind others than those who heard it. Neither Williams nor Gentry seem to have known anything of the land previous to their coming, or to have had any knowledge of its number or boundaries. Gentry claims to have dug a hole soon after he got on the land on the 22d near where his house is now built, but it is shown by no other testimony. Williams swears that Gentry passed him where he was at work on his claim about sunset on the 22d, and asked him if that was his quarter, and on being told that it was, was asked if he had one and replied, yes, about a mile or a mile and a half west. Witness Peterson on page 20 of the record says that Gentry came to his camp on the corner of Sec. 7 on the morning of the 23d and asked him to help him locate the corners of a claim; that they located them as best they could, and that Gentry built one or two square pens. They were on Sec. 8. Gentry says himself that he gave a man by the name of Peterson \$1.00 to locate his lines; that he built a pen, and that it was on Sec. 8. To my mind the evidence leaves the matter in great doubt as to the land Gentry first selected. Your office as well as the local officers, however, have found it to be the claim in controversy, and I shall proceed to inquire how far Gentry has followed up his verbal announcement that he claimed that land. The evidence does not show any staking or flagging of the claim. The building of the pen or pens on the morning of the 23, and the writing of his name on a tree, he admits was on Sec. 8. He went at once to Guthrie, and on September 28, made his filing. He says he returned to the claim and established his residence upon it on the 15th of March, 1892. This was seven days before the expiration of six months from the time he claims to have selected and claimed it. His rights, whatever they are, must rest either upon his priority of settlement or upon his entry. If they are to rest upon his entry it is to be said that it was not made until September 28, at which time Williams was a settler and working upon the land, having followed up his settlement made on the day of the opening, and Gentry's rights, under his entry, would be subject to Williams's rights as a prior settler. If Gentry does not rely upon his entry, but upon

his settlement made prior thereto, then the rule that he had six months from the date of his entry within which to establish residence does not apply. That rule applies only where the land entered was unoccupied and unsettled at the date of the entry. Rights under the entry are superior to any settlement rights which are founded after the entry, unless the entryman fails to establish residence within six months after entry. If he is forced to rely upon his first acts of settlement, where there is another settler on the land claiming to be the first settler, then it must be shown that such first acts of settlement were maintained and followed up promptly and residence established within a reasonable time. The case is to be treated then as though Gentry had not made entry at all. In the case of *Pickard v. Cooly* (19 L. D., 241), it was held—"that the right of a homesteader who files soldier's declaratory statement, to make entry, dates from such filing, and he cannot thereafter as against an intervening adverse claimant take advantage of a settlement made prior to said filing." In the case of *Wood et al. v. Tyler* (21 L. D., 156), it was held,—“that a homesteader cannot claim the privilege of a soldier's declaratory statement, and a settlement at the same time.”

I am unable to see why such homesteader should be allowed to claim the benefits of a formal entry and of prior settlement at the same time, and think in all such cases he must rely upon the one or the other.

Williams in this case is shown to have reached the land in fifteen minutes after it was opened to settlement, and to have immediately commenced improvements. He slept on his claim the night of the 22d, and on the 23, began cutting house logs. This work was continued for three days. He returned to Guthrie on Friday and came back to the claim Saturday evening, bringing his wife with him. He continued to work on his house and began living in it in ten days from the opening. He and his wife have lived on the claim ever since. They have now two houses, one fourteen by fourteen and the other eighteen by nineteen, the one of hewed logs and the other of rough, and over four acres of land broken and three in cultivation, though he owns no team. These facts show a settlement made in good faith, promptly followed up, and unbrokenly maintained. Gentry has now a residence upon the claim and some land broken. For several months after the day of the opening he seems to have paid no attention to it. In my opinion, his first acts of settlement, if it can be said that they were upon this land at all, cannot be said to have been maintained within the meaning of the law, nor was his residence established within a reasonable time. Measuring the rights of the parties by the acts of each upon the land, and the time and order in which these acts were performed, it must be held that Williams' rights are superior to those of Gentry, he having allowed the presumption of abandonment to arise against him.

Your office decision is accordingly reversed and Gentry's homestead entry cancelled. Williams will be allowed to make entry upon compliance with the law and the regulations of the Department.

RAILROAD RIGHT OF WAY—DEFINITE LOCATION.

RIO GRANDE AND PAGOSA SPRINGS R. R. CO. ET AL.

The papers and maps of beneficiaries under the railroad right of way act are required to be complete in themselves, and wholly independent of those filed by any other company.

Acting Secretary Sims to the Commissioner of the General Land Office
May 27, 1896. (A. M.)

On the 8th instant, you submitted a certified copy of the articles of incorporation of the Rio Grande and Pagosa Springs Railroad Company and the due proofs of its organization; also like papers respecting the incorporation of the Rio Grande and Pagosa Springs Railroad Company in New Mexico.

These papers are filed by the respective companies to secure the benefits of the right of way railroad act of March 3, 1875—18 Stat. 482—and their acceptance is recommended. They have been examined and found to comply substantially with the requirements of the regulations under the act, they are acceptable to the Department and you will so advise the companies.

You submitted with these papers a joint map of definite location of a section of 4.94 miles of the line of road of the former company in Colorado and of 5.94 miles of that of the latter company in New Mexico.

This map is not satisfactory. The companies that have joined in presenting it are separate organizations and have each filed separate sets of papers in compliance with the law and instructions thereunder, which have been accepted as above. They should also file separate and distinct maps of sections of their respective lines of road and such maps should meet the requirements of the right of way railroad circular as to affidavits and certificates, following the forms prescribed.

The papers and the maps of the several companies, beneficiaries under the right of way railroad act, are required to be complete in themselves and wholly independent of those of any other company.

By reason of the foregoing the map has not been approved.

RAILROAD GRANT—TERMINAL LINE—WITHDRAWAL ON GENERAL ROUTE.

MORRILL v. NORTHERN PACIFIC R. R. CO.

By the establishment of the western terminus of the main line of the Northern Pacific at Tacoma lands north of such terminal line are released from the effect of the prior withdrawal thereof on general route.

There is no authority under the grant to the Northern Pacific for a withdrawal on a second or amended map of general route.

The amended map of the general route of its branch line, filed by the company in 1876, was an abandonment of its previous general route of said line, as shown by the map of 1873, and a relinquishment of all rights under the withdrawal in accordance therewith.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 9, 1896. (W. F. M.)

On February 23, 1893, Benjamin G. Morrill applied to make homestead entry of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 21, township 20 N., range 10 E., Willamette meridian, within the land district of Olympia, Washington, alleging settlement on or about October 20, 1884.

The local officers rejected the application for conflict with the grant to the Northern Pacific Railroad Company, and on appeal to your office this action was affirmed.

In appealing the case to this Department Morrill has specified a number of alleged errors, but the question at issue, generally stated, is whether or not the land in controversy has passed to the company by virtue of the grant, and its consideration leads to a specific examination into the acts of the company with respect to the grant, in so far as the interests of the appellant may be affected thereby.

It appears that the land lies within the limits of the withdrawal on the map of general route of the main line filed August 13, 1870, also on the maps of general route of the branch line filed, successively, in 1873, in 1876, and in 1879, its location with respect to the route of 1873, however, depending upon the manner in which the terminal for that line shall be drawn. It lies, also, within the limits of the grant as indicated by the map of definite location of the branch line filed December 8, 1884. If Morrill settled on the land, as alleged, in October, 1884, it is excepted from the grant, unless at that date it was in a state of reservation by virtue of the filing of some one of the several maps of general route.

By resolution of the board of directors of the company, of September 10, 1876, the terminus of the main line was fixed at Tacoma, and the land is north of the terminal line established upon the terminus thus adopted by the company. As to lands so situated it has been held by this Department, in a recent case, that they are released from any claim of the company arising out of the withdrawal on the map of general route of the main line filed in 1870. *Denny et al. v. Northern Pacific R. R. Co.*, 21 L. D., 252.

As to the maps of 1876 and 1879, it has been held here that the grant provides for but one legislative withdrawal on the filing of the map of general route, which exhausts the legislative will with respect to such preliminary withdrawal, and precludes the subsequent exercise of executive authority to make a further withdrawal for such purpose on a second or amended map of general route. *Cole v. Northern Pacific R. R. Co.*, 17 L. D., 8.

It results, therefore, that unless held in reservation by the map of 1873, the lands involved in this case were free and subject to entry at the date of Morrill's settlement in October, 1884.

On November 24, 1876, Secretary Chandler approved an amended map of general route of the branch line, using the following language:

The Northern Pacific Railroad Company having abandoned the general route of its branch road, designated by map thereof filed in this Department August 16, 1873, and thereby relinquished all claim to the lands withdrawn upon the approval of said map, and having adopted by resolution of the board of directors bearing date May 11, 1876, in lieu of said route, a general route of such branch road, laid down on this map, and said route being by me deemed in all respects preferable to the one so abandoned, I hereby approve this map, in accordance with the application of said company.

In 1877 Hon. O. Jacobs filed an application here for a reconsideration of the action of the Department approving the map of 1876, the grounds of which need not be considered at this time. On January 8, 1877, the attorney of the company filed in this Department a statement of his objections to the reconsideration asked for by Mr. Jacobs, in which the following paragraph occurs:

By the amendment the branch is shortened and a more direct and feasible route obtained; the territory will be more benefited because the amended line or a portion of it will be built and all may be—but the old line cannot be,

and in concluding the paper, as if not only to emphasize the company's purpose to abandon the route of 1873, but to make plain that it had been, already, at that date, abandoned, he says:

that since the acceptance of the amended line by the Department, the company has contracted for the ties for twenty-five or thirty miles of the road; part of the iron has already been purchased and shipped, grading has commenced and the company are moving in good faith to accomplish its work; and for the Department to now recall its approval would be to entail great loss on the company and defeat the construction of any part of the branch line.

The logic of these statements appears to me to be so clear that it cannot be misapprehended or misconstrued, and the meaning of the language is inconsistent with any theory other than that the company had at that time wholly abandoned the line of 1873, and were not considering it at all in connection with its plans for the ultimate construction of the road. It is confirmatory of the representations made to the Secretary of the Interior, when the map of 1876 was presented to him for his approval, that the company had abandoned the route of 1873 and relinquished all claim to the lands withdrawn by virtue of the filing of the map indicating that route.

The subsequent acts of the company so completely confirm the theory of abandonment that all doubt of its correctness is removed. In 1879 it filed a second amended map of general route indicating a proposed line widely variant from the abandoned one of 1873, more nearly conforming to the line of 1876, and along the general route of final construction.

Following the declarations of the company as to the infeasibility of

the line of 1873 and of its purpose not to build on it, are its acts beginning construction, in 1876, on a new line, and definitely locating the road, in 1884, on another and different line.

The road is now completed and in operation, but the lands withdrawn along the route of 1873 had not been restored by any formal order of this Department to the public domain until 1879, and then only to the extent of the lands that fell without the limits adjusted upon the line of 1879. It will probably not be contended that any such order was necessary, but it will be conceded that such restoration would have been *ipso facto* effected by the building of the road on a different route; and if that be true, restoration was equally effected when the route of 1873 was explicitly, definitely and finally abandoned. If the lands along that route were in a state of reservation after 1876, they are in the same condition now. Their status with respect to the work of public improvement had in contemplation by Congress, and which was the motive of the grant, has not been altered since that date. Of these lands, generally, it may be said that after definite location they bore no relation to the grant, and neither did they, for the same reason, after 1876.

By virtue of the circumstance, however, that the land in controversy is situated near the common terminus of the constructed road and of the route of 1873, it happens that the limits of the grant as adjusted include it, and that it may be within the limits of the withdrawal on the map of 1873, dependent, as before stated, upon the way in which the terminal is drawn. I do not think this coincidence affects its status. The route of 1873 was abandoned, as a whole, and the lands withdrawn, therefore, were released along its entire length.

I am not advised that any decision has been rendered here distinctly in conflict with the foregoing views since the early case of Northern Pacific Railroad Company *v.* Pressey, reported in 2 L. D., p. 551. That case, however, proceeds upon the theory, now exploded, that the company might file amended maps of general route and that executive withdrawals thereon were effective to reserve the lands within their limits. It does not appear, furthermore, that the acts and declarations of the company, evidencing its abandonment of the line of 1873, were brought to the attention of the Department, since the subject is not discussed, nor even adverted to.

In the more recent case of Northern Pacific Railroad Company *v.* McMahon, 18 L. D., 435, the conflict is more apparent than real. It was there held that the relinquishment of the company, filed in 1879, of all claim to lands withdrawn on the map of 1873, cannot, in good faith, be invoked against the company by the United States, in view of the decision by this Department that the later withdrawal in 1879 was without authority of law. But, as in the case of the company against Pressey, *supra*, the question of abandonment of the route of 1873 was not made an issue, and was not discussed.

From the foregoing considerations it will be seen that no lands were in reservation for the benefit of the branch line of the Northern Pacific Railroad Company after its abandonment, in 1876, of the route of 1873, and it results, therefore, that the land sought to be entered by Morrill was free of any claim of the company at the date of his alleged settlement in October, 1884.

The decision of your office is, therefore, reversed, and it is now ordered that a hearing be directed for the purpose of inquiry into the facts concerning Morrill's settlement.

AYLEN *v.* YOUNG ET AL.

Motion for review of departmental decision of December 28, 1895; 21 L. D., 565; denied by Secretary Smith, June 9, 1896.

PRACTICE—NOTICE OF HEARING.

NEEDS *v.* HINZE.

In computing the period of notice, given by personal service, of a hearing before the local office, the day on which service is made should be excluded, and the time counted as beginning to run on the next succeeding day.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (W. M. B.)

The petitioner Hinze applies, under Rules 83 and 84 of Practice, for an order directing the Commissioner of the General Land Office to certify to this Department the proceedings in the case of William Needs, contestant, *v.* Conrad Hinze, contestee, involving the latter's homestead entry No. 2178, made February 23, 1891, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21, T. 48 N., R. 9 W., Ashland land district, Wisconsin.

The record in this case shows that a hearing was ordered upon the charges made by the contestant Needs against the claimant Hinze with respect to abandonment and failure on the part of said entryman Hinze to cultivate and improve the tract in question as prescribed by the homestead law. It is further shown that notice of such hearing was served upon Hinze in person on April 14, 1894, to the effect that a hearing to consider and determine the issues made by contest affidavit of Needs had been ordered and set for May 14, 1894. It further appears that such hearing was had on the said day, at which the contestant appeared and submitted testimony in support of the allegations contained in his affidavit of contest; the contestee failing to appear thereat, either in person or by attorney. Upon the testimony submitted by contestant (contestee submitting none) at the hearing had on said May

14, 1894, the local officers found in favor of contestant and against contestee and recommended that the entry of the latter for the tract in dispute be canceled on account of abandonment thereof for more than six months immediately prior to initiation of contest, and failure to cultivate and improve the tract as provided by law.

The defendant Hinze did not appeal from the action of the local officers, whereupon their finding was, on August 31, 1894, concurred in and sustained by your office.

In due course of time Hinze filed a motion asking for a review and reversal of your said office decision, which said motion after a careful consideration was dismissed upon good and sufficient grounds.

From the decision of your office, dated August 31, and December 1, 1894, canceling entry and closing case, in accordance with Rule 43 of Practice, and dismissing motion for review, the defendant appealed.

The right of appeal was denied appellant under provision of amended Rule 81 of Practice, which prescribes that no appeal shall be taken from the action of your office "affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local office," as in the case at bar.

The record shows that Hinze had such notice of the decision of the local office.

The said entryman now raises the question of jurisdiction as to the authority of the local officers to hear and determine the case on May 14, 1894, alleging that such hearing under Rule 7 of Practice could not have been had until thirty days from date (April 14, 1894) of notice, and that under said rule the 15th, instead of the 14th, day of May was the earliest day on which said hearing could have been held. Upon that ground the case is brought here upon a motion asking that a writ of certiorari be issued to your office for the purpose already stated.

As stated, personal notice was served on Hinze on April 14, 1894, whereby he was notified that a hearing was set for May 14, 1894. He absented himself from the hearing had on that day, and contends that the day fixed for the same was short of the time prescribed by Rule 7 of Practice, for the reason that in computing the thirty days therein allowed both the day on which notice was served and trial day should have been excluded, whereas only one day had been left off in the reckoning of said time.

Applicant seems to be in error in regard to such contention. The method of computing time under Rule 7 of Practice is enounced in departmental decision of September 12, 1895, in the case of *Hart v. Hector* (21 L. D., 164), wherein it is held that in computing time, where notice of date of hearing is served upon a party thereto, it is proper to exclude either the day on which notice is served or the day on which the trial is to take place, but not both days. *Vide also, Forsyth v. Warren*, 62 Ill., 68; *Kane v. Brooklyn*, 114 N. Y., 586.

Personal service on applicant of notice of hearing fixed for and had on May 14, 1894, as stated, having been had on him April 14, 1894, he had the prescribed thirty days notice, since time began to run on April 15th, and, under the rule laid down in the cases above cited, including the 14th day of May, 1894, it will be seen that the applicant had thirty days notice of time of hearing exclusive of service day of notice, hence the contention of petitioner that the local officers did not have jurisdiction of the case on account of insufficient notice is without force or merit.

Furthermore the application contains no sworn statement of facts or showing whereby it appears that any error was committed by your office in the decision from which appeal was taken and denied, or that substantial justice was not done petitioner in the decision complained of. The application is based upon a mere technicality, and not upon any merit which the case may be supposed to possess, which would be a sufficient ground within itself for dismissing the same.

For the foregoing reasons the application is denied.

HOMESTEAD CONTEST—SETTLEMENT RIGHTS.

MYRICK *v.* HENNIGH.

Mere personal presence on public land, without the performance of acts connecting the claimant with the land, is not a settlement within the meaning of the law.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (G. C. R.)

On October 13, 1893, George S. Hennigh made homestead entry of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 3 and 4, Sec. 5, Tp. 19 N., R. 6 E., Perry, Oklahoma.

On October 28, 1893, Fred D. Myrick filed his affidavit of contest against the entry, alleging prior settlement upon the land.

Hearing was had, and the register and receiver recommended that the contest be dismissed.

On appeal, your office, by decision dated May 2, 1895, decided that "the only issue in this case is priority of settlement," and that from the testimony submitted you were "unable to come to any satisfactory conclusion as to which one of the parties was the prior settler." This being the case, your office directed that plaintiff and defendant be required to divide the land between them "in such manner as they may agree upon," allowing thirty days to make the agreement; that upon failure to agree, the land will be sold to the highest bidder as in cases of simultaneous applications to enter, or, if the parties so desire, they may settle the case by entering into an agreement by which one of them shall receive patent for the whole tract, and then convey a specified portion of the land to the other.

This judgment does not appear to satisfy either party to the controversy, since both have appealed, each insisting that the evidence taken at the hearing gives him a better right to the land.

The testimony shows the following state of facts:

Myrick, the contestant, made the run from the Creek line when the signal was given, at 12 o'clock, noon, September 16, 1893. He testified that the distance from that line to the land is five miles; that he rode a gray horse, which had no equal in the crowd for speed, having had three months training; that he ran in advance of all others, by reason of the speed of his horse. He does not know how long it took him to make the race; he located on the southwest corner of the land, fifty yards north of south line; that where he first located, he could see all over the land, except about five acres near the southwest corner; that no one was there when he first located. He thus describes his acts:

I first, pulled off my saddle, stopped, and in about five minutes waved a man over to where I was, and which (whom) I passed on the road, who threw me out about half bushel of corn. I fed my horse, and shelled the balance of the corn where I was standing I fed the horse on the ground I left the claim about half an hour by sun to bring my things out from where I left them; returned same evening two hours after dark; Otis Ritchie came back with me; set off wagon bows, top side boards, wagon sheet, clothes chest, cooking utensils, bed, and a little feed; slept there that night (i. e., 16th September), where I stopped. On claim next day (Sunday, September 17), and ran south and west lines; staid there Sunday night, went to Perry Mouday; returned to land Wednesday (September 20). On Friday (September 22) plowed a small patch and next day built a sod house; that Hennigh (entryman) had no improvements when contestant did the plowing; had then been all over the claim; plowed about three acres on October 2; and when on October 13 Hennigh had made entry, he (contestant) had three acres plowed, sod house, and well four feet deep dug second Sunday after opening; that he now (date of hearing) has a box house eight by twelve, cave ten by twelve, shed sixteen by fifty, fifty acres plowed; fifteen acres back-set; pasture of fifteen acres enclosed with two wires; a pond, and hay cut and put up from eighty acres.

On cross-examination he admitted he had not staid on the land all the time, nor eat all his meals there; that he left the land and went to Kansas about November 10, 1893; returned March 1, 1894; that he was detained in Kansas by sickness. The following question was asked him:

What notice did you give other than personal presence that you were claiming the land?

A. I only claimed the land which I then held down, which ever it might be.

He further admitted that when he first got to the land all he did was to feed his horse; that he left his saddle, blanket, martingales, and shelled corn to hold down his "spot" until he returned with his wagon. (This was about half an hour before sundown of September 16.)

N. Miller (witness for Myrick) testified that he made the race with Myrick, kept up with him for three-quarters of a mile, when his horse fell. Myrick then got three hundred yards the start, and kept that distance to the land. This witness saw no other person on the land as

he passed it. Miller says Myrick was ahead of all other men, except three; that his (Miller's) horse was not trained. This witness testified that when Myrick left the land late in the evening of the 16th, he (Myrick) wrote his name on a corn shuck, and left it on the ground under some corn cobs.

One Dunn, a witness for Myrick, testified that he was riding a mule in the race, and kept company with Myrick for about three miles and kept in sight of him the rest of the way.

From all the testimony it may be safely said that Myrick reached the land shortly after twelve o'clock; that he fed his horse; that he brought his team and camp outfit to the land that night; that in a few days he built a sod house; that he left the land and staid away from November 10 to March 1 (two months and twenty days); that his absence was excusable by reason of sickness; that he returned to the land, built a small house, improved the land, and continuously resided there. He is mistaken, however, in saying he distanced all others. At least three men kept up with him; and his trained horse went but little faster than Dunn's mule.

Hennigh, the entryman, testified that he made the race; that he also rode a trained horse; went due west of Creek line, and reached the land "about eleven minutes after twelve;" that he first "stuck a stake" that he carried with him; that this stake was three feet long, his name written thereon; put a flag on the stake, and put his hat on the stake and tied it fast. In about half an hour from that time, his brother came with a wagon, gave him a spade with which he dug some holes (one of which was for a well), set up the wagon bow, and stretched a quilt over it; that he saw no other person on the land except his brother, who located on the west part of it; saw other men located on surrounding lands; did nothing further that day but look for lines and corner-stones; that this settlement was made about one hundred and fifty yards west of east line, and about sixty rods north of south line; staid on land that night (September 16) with three of his brothers, had his team and camp outfit, and saw no one on land but his brothers; staid till noon of September 17, and did some breaking on west side and some on east side of claim, two furrows thirty yards long and some short furrows; three brothers were with him when he did the breaking. Left at noon of September 17, and nothing was done at place where Myrick is alleged to have settled; went to Perry to file, and returned September 21, staid there that night, looked over land, left next morning, and returned again October 6, and did more plowing; that he then saw for the first time a sod pen and a little plowing; that this plowing ran across the plowing done by him (Hennigh). Went back to Perry to file and returned again October 19; that he then cut and hauled logs, and built the walls of a house; slept, cooked, and ate on claim while doing this work, and on October 28, went to Kansas, where his father lived, to get furniture for his house and money to complete it;

returned to land November 28, 1893, bringing stove, cooking utensils, bed, etc.; put the roof on his house, plastered it, moved in, and has lived there continuously ever since; has twenty acres broken; stable; corn crib; well; orchard of thirty trees; small fruits, berries, grapes, etc.; nineteen acres in crop; good garden; raised two hundred and twenty-five bushels of corn; improvements worth \$150. His testimony is substantially corroborated, as to his settlement, residence and improvements.

While the testimony of both parties is corroborated, it is difficult to understand why neither should have seen the other on the day they reached the land, each is seemingly positive that the other was not there. Assuming that they reached the land at the same time, the issue is narrowed down to the acts of settlement first made by each. Myrick, unfortunately, did nothing on the land the first afternoon but feed his horse. He did no specific act to give notice to others that he intended to settle. He put up no flag, dug no holes, and made no improvements whatever; and it was not until two hours after nightfall of the day of the opening that he had his camp outfit there. In the meantime, Hennigh, the entryman, who appeared upon the land about the same time, immediately set a stake on which was a flag, and dug some holes and started a well.

Settlement upon the public land is not affected by merely going upon the land; there must be *something done* to indicate that the party intends to take the land; and, although one may in fact precede another to a tract of public land, intending to enter the same under the public land laws, yet if he postpones the performance of some definite act of settlement sufficient to give notice thereof to passers by, until after a later comer reaches the land and performs such acts of settlement, it can not be held that he has made the prior settlement; for, as before seen, mere personal presence, without the performance of some acts connecting the person with the land, is not a settlement within the meaning of the statute. *Hurt v. Griffin*, 17 L. D., 162; *Strutz v. Crabb*, 19 L. D., 122.

The issue in this case is as to who made the first settlement. From what is above seen, in the rather lengthy recital of the facts, that issue must be decided in favor of Hennigh. His entry will, therefore, remain intact and the contest will be dismissed.

The decision appealed from is accordingly reversed.

SETTLEMENT RIGHTS—ADVERSE CLAIMS.

SHOOK *v.* DOUGLAS.

A settlement claim acquired with the knowledge of, and under an agreement with an adverse claimant, is entitled to recognition as against the subsequent claim of said adverse claimant.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (E. B., Jr.)

I have considered the case of Marion F. Shook *v.* John Douglas, on appeal from your office decision of March 20, 1895, holding Douglas' homestead entry, No. 3035, Humboldt, California, land district, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 3 N., R. 3 E., H. M., subject to the prior right of Shook as to said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$.

I find the material facts to be substantially as set out in said decision. Douglas established his residence upon the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the section while the land was unsurveyed and long prior to the settlement of Perrine's father-in-law to whose possessory rights Shook, step-son of the latter, succeeded by purchase in 1879. The testimony adduced at the hearing duly had between the parties in October, 1892, shows that in 1877 Douglas agreed with Perrine that the former should hold and occupy the land lying west of a line running north and south through a large rock near the center of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the section and that the latter should likewise take the land lying east of such line, and that later—about 1884—Douglas and Shook agreed upon a divisional line some distance to the westward of the first line. This later line, as was subsequently disclosed by the government survey in the summer of 1891, was only a few rods east of the north and south center line of the section and left most of the land in controversy in possession of Shook.

Shook having settled upon and claimed the land in controversy with the knowledge and consent of Douglas, and under an agreement between them, and having, as appears from the record, presented his application therefor on the same day Douglas made his entry, and within three months after the filing of the plat of survey in the local office, Douglas will not be permitted now to repudiate the agreement and enter the land in the face of Shook's adverse claim. The case of *Walters v. Minter* (17 L. D., 187) is directly in point and supports the view I have just expressed. Said decision is affirmed.

TIMBER LAND CONTEST—CHARACTER OF LAND.

JOHNSON *v.* MACMILLAN.

The act of June 3, 1878, provides for the disposition of lands that are not, at the time of sale, fit for cultivation on account of the timber thereon.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (W. M. W.)

I have considered the case of Oscar L. Johnson *v.* Willis M. MacMillan, on the appeal of the former from your office decision of June 5, 1895, dismissing his protest against the timber land application of said MacMillan for lots 9 and 10 and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 23. R. 17 W., San Francisco, California, land district.

The record shows that on April 1, 1891, Willis M. MacMillan filed in the local land office at San Francisco, California, his sworn statement to purchase the land involved under the act of June 3, 1878 (20 Stat., 89).

MacMillan gave notice of making proof, and on July 7, 1891, one George C. Johnson filed a protest, alleging that the land was agricultural in character.

A hearing was had, and upon the evidence submitted the local officers found the tract to be timber in character within the meaning of the act of June 3, 1878. On appeals by said Johnson from the local officers' decision and your office decision, the finding of the local officers was sustained by your office and the Department, and the case closed June 18, 1894.

On July 23, 1891, Oscar L. Johnson filed an affidavit and his application to contest the right of MacMillan to enter said land under the act of June 3, 1878, alleging that said lands

are agricultural in character, of good soil, and will, when the timber is removed therefrom, produce good crops such as are raised in California, and that the said land is not of such character as is subject to entry under the act of June 3, 1878.

This affidavit was with the record when your office by its letter "G" of June 18, 1894, closed the case of George C. Johnson *v.* said MacMillan. In said letter "G" it was stated that:

Oscar L. Johnson's affidavit and application to contest MacMillan's claim must now be given proper attention, and is hereby returned for due action thereon by you. The record in the above entitled case (of George C. Johnson), or any part thereof which you may require, will be returned on your request.

Thereupon, the local officers ordered a hearing on the affidavit of Oscar L. Johnson to determine the character of the land involved.

On January 16, 1895, the local officers recommended that Oscar L. Johnson's contest be dismissed.

Johnson appealed to your office.

On June 5, 1895, your office dismissed Johnson's protest, and directed that upon such decision becoming final that "MacMillan's final proof will be accepted, and he will be allowed to enter the land."

Johnson appealed.

MacMillan filed a motion for review of your office decision, on the ground that no right of appeal should have been allowed Johnson.

On August 30, 1895, said motion was denied by your office.

The third specification of error assigned in appellant's appeal is as follows:

The Hon. Commissioner erred in ruling that the evidence submitted in this case shows the land to be subject to entry under the act of June 3, 1878.

At the time set for trial Johnson filed a motion for a commission to take the depositions of five witnesses who were not present, but if they had been present would testify that the land is chiefly valuable as agricultural land, and if cleared of its timber good paying crops, such as are ordinarily raised in California, could be raised on it, and an ordinary man could make a good living for himself and family on it. This motion was granted by the local officers.

If the case can properly be determined on the evidence introduced in this case without considering the evidence in the George C. Johnson case, it will be unnecessary to pass on or discuss the other questions presented by the appeal, for the reason that if any error was committed by your office in passing on the other points decided, it would be error without prejudice.

The receiver of the local office testified that Johnson offered to file his homestead application for the land in controversy and tendered the filing fee, which was rejected.

Johnson was called as a witness on his own behalf, and testified that he commenced the contest in good faith. That he had been over every subdivision of the land in question. That he lived in a half mile of it, and had lived there four years. That the land was valuable for agricultural purposes. That the land would be susceptible of cultivation if the timber standing upon it were removed. The register asked him: "Of the one hundred and sixty acres involved in this contest how much of it is timber now growing upon?" Thereupon the record shows that: "Counsel admits for Johnson that it is all covered with timber." He further testified that said land was covered with redwood, fir and oak timber. That the redwood and fir trees average about four feet in diameter and the oak trees about one foot in diameter.

The admission that the tract is all covered with timber is in its nature conclusive as against Johnson as to the fact admitted, and the same is true respecting his evidence as to the character of such timber and the size of the trees growing on the land.

In *United States v. Budd*, 144 U. S., 155-167, involving the construction of the timber and stone act of June 3, 1878, the supreme court uses this language:

Lands are not excluded from the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present.

The rule announced in the Budd case has been followed by the Department. See *Kelly v. Ogan*, 15 L. D., 564; *Gilmore v. Simpson*, 16 L. D., 546; *Robert v. Brownell*, 18 L. D., 216, and *Gibson v. Smith, Id.*, 249. In the latter case it was held that the word "timber" as used in the act of June 3, 1878, refers to such trees as are valuable for commercial purposes. The timber on the land involved testified to by Johnson is certainly valuable for commercial purposes.

For these reasons your office decision appealed from is affirmed.

McLEAN v. UNION PACIFIC RY. CO.

Motion for review of departmental decision of February 21, 1896, 22 L. D., 227, denied by Secretary Smith, June 9, 1896.

TOWN LOT—SETTLEMENT RIGHT—TRANSFEREE.

DELLA BROWN ET AL.

The possessory right acquired by the first occupant of a town lot is a proper subject of sale and transfer, and the delivery of actual possession to the purchaser, before the prior occupant leaves the lot, renders the date of his occupancy available to the purchaser if he continues his occupancy until the date of the townsite entry.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (C. J. W.)

On November 3, 1893, Della Brown filed her application before townsite board No. 8, for a deed to lot 17, block 24, Perry, Oklahoma, alleging that she was the first occupant of the lot, and that she had made valuable improvements on it. On the same day Mary Patterson filed her application for deed to this lot, alleging that she purchased the possessory right of J. P. Jones to the same, and that since said purchase she has been an occupant thereof, and had made valuable improvements.

On November 15, 1893, Alexander M. McElhinney filed his application for a deed to said lot, alleging that he took possession of it on September 16, 1893, and that he was an occupant thereof.

Perry Pringle and Alice E. Lionberger, after filing applications made default at the time of the hearing, and have ceased to be parties to the controversy.

The contest at the hearing was between Della Brown, Mary Patterson and Alexander M. McElhinney, at which hearing some forty witnesses testified, their testimony covering over three hundred typewritten pages, and forming altogether a mass of badly conflicting testimony, much of which is immaterial. That it is difficult to extract certain truth from it, is indicated by the fact that each member of the

board was led to a different conclusion by it, as to who was the first occupant of the lot. One member of said board found that Della Brown reached it first; another that Mary Patterson was first, and the third that McElhinney was the first occupant. Each of the applicants appealed from the decisions which were adverse to them, and said appeals were considered together by your office on September 3, 1895, and the conclusion reached, that a preponderance of the evidence showed that John P. Jones was the first to occupy and stake the lot; that he transferred his possession and right to Mrs. Patterson on the afternoon of September 16, 1893, and that she has continued the occupancy, has improved the lot, and is entitled to a deed for it. From this decision Alexander M. McElhinney and Della Brown have each appealed.

Della Brown insists that it was error not to find that by a preponderance of the testimony, she is shown to have been the first occupant of the lot, and McElhinney insisting that it was error not to find that he was first. Each of the appeals contains the allegation, that it was error to hold that Jones transferred, or could transfer, his occupancy and possession to Mrs. Patterson, and that she thereby got the benefit of his occupancy. The appeals therefore present two grounds of error,—one being an error of fact, and the other an error of law. These will be considered in the order stated.

After considering the theories of the evidence presented in the opinions of the different members of the board, as well as the theories presented in the arguments of counsel, in connection with the record itself, I am led to concur with your office in finding that Jones was the first person who occupied and staked the lot in question on the day of the opening, and that he transferred his possession of the same soon afterwards, on the evening of that day to Mrs. Patterson.

The remaining question is, Did the transfer of his possession to Mrs. Patterson, for a valuable consideration, permit her to tack his prior possession to her subsequent possession, so as to give her the benefit of it, as between herself and one who claims to have come upon the lot, before the transfer was effected. It is insisted in the first place that Jones had nothing to sell or transfer, and in the second place that the written evidence of the transfer on the back of Jones' booth certificate is inadmissible, because not acknowledged before a proper officer. Jones seems to have been a qualified lot occupant, and the evidence shows that he made the run from the line on the day of opening, starting with others at the proper time, and that he reached and staked this lot, while it was yet unoccupied, and that he was upon it in person with his horse and saddle when Mrs. Patterson reached it, and proposed to buy him out.

In my opinion he had initiated a settlement upon the lot, which being maintained until the time of the townsite entry embracing it, would have entitled him to a deed, and he thereby acquired such a con-

tingent interest in the lot, as might lawfully be made the subject of sale or transfer. Your office properly held that it was not necessary to determine, whether the writing on the booth certificate offered to prove the transfer from Jones to Mrs. Patterson, was admissible or not,—the fact being one which could as well be established by parol as by written evidence. Jones testified orally to the sale and transfer of his possession and to the receipt of the money paid him in consideration of the same.

Settlement rights under homestead laws are distinguishable from such rights where the settlement is made upon a town lot. The sale of the improvements of a prior homestead settler does not make his date of settlement available to his vendee, for the reason that the establishment of personal residence, within a prescribed time, and the maintenance of such residence for a prescribed period, are required under the homestead laws. The reason for this rule does not apply to settlement on or occupancy of town lots, under the townsite laws, nor does the rule itself. The sale of his evidences of settlement by a first occupant of a town lot, and the delivery of actual possession of such lot to the purchaser, before the first occupant leaves it, renders the date of his occupancy available to the purchaser, who continues the occupancy until the date of the townsite entry.

Your office decision is accordingly affirmed.

SOLDIER'S ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3, 1891.

WELCH *v.* PETRE ET AL.

The purchaser of a soldier's additional homestead right is entitled to the benefit of the confirmatory provisions of section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (C. J. W.)

On August 31, 1887, Matthew B. North made soldier's additional homestead entry, No. 3661, F. C. 1329, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and lot 4 Sec. 20, T. 62 N., R. 14 W., based on certificate of right issued by your office in North's name on September 12, 1878. By letter "C" of December 28, 1889, your office held said entry for cancellation, because based on military service performed in the Missouri Home Guard. Assignees of North appealed to the Department.

On April 8th, 1890, William Welch filed his application to enter the land in dispute, which was rejected by the local officers for conflict with North's entry, and Welch appealed to your office. Your office without acting on said appeal forwarded it to this Department for consideration in connection with North's appeal, but no notice was

taken of it in the decision rendered here, as it was not covered by the appeal from your office. In said decision rendered June 16, 1892, it was held that the soldier's additional homestead entry in the name of Matthew B. North was confirmed by the 7th section of the act of March 3, 1891 (26 Stat., 1095). A motion for review of said decision was duly filed and allowed, and on June 2, 1893, on review of the same, said decision was reversed and recalled, and it was held that said entry, made in the name of said North was not covered by the confirmatory provisions of section 7, act of March 3, 1891, *supra*.

In promulgating the decision of June 16, 1892, your office affirmed the action of the local officers in rejecting Welch's application, but in the notice to Welch's attorney it was simply stated that action had been taken in his case by promulgating departmental decision of June 16, 1892. This was by letter "C" of your office of July 7, 1892, and seems to have led to the filing of the motion for review of departmental decision of June 16, 1892, which resulted in the reversal of the same, and the cancellation of North's entry. (16 L. D., 484.) This last decision was promulgated by your office letter "C" of July 6, 1893, in which the local officers were directed to advise the parties interested in the entry of North that thirty days from said notice would be allowed in which they might take action under the act of March 3, 1893 (27 Stat., 593), and in a letter of same date Welch's attorneys were advised that his application could not be considered until the expiration of said thirty days.

The transferees of North filed application in the local office to purchase June 5, 1893, upon which action had been suspended until your office letter "C" of July 6, 1893, was received, when the same was allowed, and cash entry 12440 made, dated July 12, 1893. Your office letter "C" of January 24, 1894, held said entry to be regular, and that the same would be approved for patent after thirty days, which was allowed Welch and his attorney to take action.

February 24, 1894, attorneys for Welch filed in your office motion for review and reconsideration of your office decisions of July 7, 1892, and January 24, 1894, affecting said tracts. On May 4, 1894, your office reversed said decisions, and held that action taken by your office under departmental decision of June 16, 1892, including the affirmance of the action of the local officers in rejecting Welch's application, was made void and of no effect by the reversal and recalling of said decision, and left Welch's application in the status of being then before your office on the appeal of Welch from the action of the local officers in rejecting it, and further that Welch's application appearing to be regular, his rights under said application were superior to those of North's transferees. Whereupon your office held cash entry No. 12440, for cancellation as to N. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 20, T. 62 N., R. 14 W., and that Welch would be allowed to make entry for the same.

On July 15, 1894, Douglas A. Petre and Robert F. Fitzgerald,

assignees, filed their appeal from said office decision of May 4, 1894, in which they make the following specification of errors:

1. It was error to hold that the contention of Welch, that he was not notified of departmental decision of June 16, 1892, but only of the promulgation of said decision, is sustained by the records of the Commissioner's office.
2. In holding that Welch's application had the present status of being before your office on the appeal from its rejection by the local officers.
3. In holding that his rights under his application were superior to those of North's transferees.
4. In not holding that the transferees of North had the right to purchase the tract covered by North's former entry under the provisions of the act of March 3, 1893.
5. In holding cash entry 12440 for cancellation.

The foregoing statement of facts indicates the steps heretofore taken in the litigation between the parties.

In the light of recent adjudications by the highest courts, it is not deemed necessary to consider the grounds of error set out in the present appeal.

When this case was first before the Department on appeal from your office, June 16, 1892, (Letter-press copy book, No. 246, page 341), it was then held that the entry in question having been made by North August 31, 1887, and sold after said entry, before March 1, 1888, to parties who were guilty of no fraud, should be confirmed under the 7th section of the act of March 3, 1891 (26 Stat., 1095), the transfer of the same having been made when there was no adverse claim. It was then said,

The applicants have furnished an abstract of title, duly certified, showing the conveyance of said tract, and who are the present owners thereof; they have also furnished affidavits that the tract has not been reconveyed to the entryman, and that they are *bona fide* purchasers. You will therefore issue a patent on the entry in question.

This decision, after its promulgation, was recalled by the Department and reversed in the case of *Cleveland v. North et al.* (16 L. D., 484), in which the cancellation of the entry was ordered, for the reason as stated that the sale of a soldier's additional homestead right was illegal and such purchaser is not entitled to the benefit of the confirmatory provisions of the act of March 3, 1891. This later decision is now under review, and the case may be regarded as open. The supreme court in the recent case of *Alfred F. Webster v. Milo J. Luther and Louis Rouchleau* (163 U. S.,) has distinctly and plainly held that the soldier's right to additional homestead, is assignable and transferable under the statute, and this notwithstanding the practice may have been different under the Land Department. It is therefore apparent that the decision of the 16th of June, 1892, announced properly the law of the case, as it was then and is now, and should not have been disturbed. The case being open and the assignees still applicants for the confirmation of said entry, it is held that the application of Welch to make entry was properly denied, and that the entry stand confirmed and patent issue in accordance with said decision of 16th of June, 1892.

WAGON ROAD GRANT—WITHDRAWAL—SETTLEMENT—ENTRY—SELECTION.

WILLAMETTE VALLEY AND CASCADE MT. WAGON ROAD CO. v. BRUNER.

While no rights are acquired as against the government by settlement on land withdrawn in aid of a congressional grant, and entries of lands so reserved should not be allowed, yet, under the withdrawal for the benefit of this grant wherein no rights to specific tracts are acquired prior to selection, and entries or filings have been allowed, based on settlement prior to selection, in violation of said withdrawal, the Department may, in its exercise of its supervisory authority, require the selection of other tracts, if it appears that the grant can be fully satisfied from the remaining lands; and to this end entries or filings of such character may be suspended to await the adjustment of the grant.

The departmental order, given in the case of Peter Clemons against said company, directing the cancellation of all entries allowed after said withdrawal, is accordingly modified.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (F. W. C.)

I have considered the appeal by the Willamette Valley and Cascade Mountain Wagon Road Co., from your office decision of December 18, 1894, dismissing its protest against the final proof tendered by Philip Bruner upon his homestead entry covering lots 1, 2 and 3, Sec. 31, T. 22 S., R. 32½ E., Burns land district, Oregon.

These tracts are within the limits of the withdrawal ordered by your office letter of July 10, 1874, on account of the grant made by the act of July 5, 1866 (14 Stat., 89), under which said company claims, which order was received at the local office August 6, 1874, and it is on account of this reservation that the company's protest is based.

The land was free from claim, so far as the record shows, at the date of withdrawal, but on November 20, 1889, the local officers permitted Bruner to make homestead entry of the land.

Prior to said date, to wit, on July 17, 1884, the company had made selection of this land.

Bruner made proof upon his entry, after due notice by publication, in which it was shown that he settled on the land March 1, 1884, and has since continuously resided thereon and improved the land.

Your office decision held that because Bruner had shown settlement prior to the company's selection, that a valid claim was initiated thereby that was a bar to the company's selection.

This case is governed by the principles announced by this Department in the case of said company against Hagan (20 L. D., 259), wherein it was held (syllabus):

No rights either legal or equitable as against the grantee can be acquired by settlement on, or entry of lands withdrawn by executive authority in aid of a congressional grant, and the failure of a grantee in such case to respond to the published notice of a settler's intention to submit final proof, can not operate to defeat the grantee's right of selection.

Under this decision Bruner's entry would of necessity be canceled, as was directed in the case of *Peter Clemons v. Willamette Valley and Cascade Mountain Wagon Road Company* (L. and R. Press book 326, p. 114), but for the reasons hereafter given I am of the opinion that his entry should be permitted to remain of record.

In this connection I must review, to some extent, the history of the grant, and the facts are taken partly from those recited in departmental letter of January 27, 1894 (18 L. D., 25).

The company's line of constructed road is 448.7 miles long, and as the grant was one of quantity—three sections per mile—it aggregates 861,504 acres.

There had been patented on account of this grant, prior to January 27, 1894, 549,809.29 acres, and 161,274.42 acres have since been patented, together amounting to 711,083.71 acres. This leaves 150,420.29 acres yet due on account of this grant.

This grant was "three sections per mile to be selected within six miles of said road," and as the lands were early withdrawn to the full extent of six miles on each side of the road, the withdrawal was nearly twice the amount of the grant.

Your office letter of January 2, 1894, reported that of the lands withdrawn 752,811.74 acres were vacant and unselected, and that in addition thereto 17,824.18 acres had been selected to which there were adverse claims.

In departmental letter of January 27, 1894 (*supra*), you were directed to serve notice upon the grant claimant requiring the completion of selections on account of the grant within ninety days from notice, after which time the withdrawal formerly made and maintained would be revoked.

No direction was given as to the disposition of the adverse claims.

Notwithstanding the fact that of the 752,811.74 acres reported to be vacant and unselected within the withdrawal made on account of this grant, 462,621.74 acres were shown to be surveyed lands (more than three times the amount necessary to fill the full complement of the grant), the order requiring that selection be made within ninety days after notice, under penalty of revocation of the withdrawal, was suspended by departmental letter of March 15, 1894 (L. D. Press copy book 280-416), in view of the fact that a bill was pending in Congress providing for the survey of the lands within the limits of this grant. This suspension seems to have stood until March 28, 1895, when in considering the case of said wagon road against Hagan (20 L. D., 259), it was said:

While I recognize the propriety of the withdrawal made by the executive to protect this company in the exercise of its right to make selection in satisfaction of its grant, I am also impressed with the importance of requiring the company to make the selections necessary to satisfy this grant as speedily as possible, in order that the surplus remaining in the limits of this withdrawal may be restored to settlement and entry. The reason alleged by the company for failure to make selections to

satisfy the grant is, that the Government has failed to have the lands surveyed. That reason no longer exists. The act of August 20, 1894 (28 Stat., 423), authorizes the deposit of a sufficient sum by the owners of grants of public lands for the purpose of having a survey of the townships within the limits of their grants. If this company refuses to accept the benefit of this act, it will be required to make its selections from the surveyed portion of lands along the line of its road, and the withdrawal of the unsurveyed lands along the line of the road will be revoked. It will, therefore, be notified that a survey must be made of such lands as it desires to survey, on or before November 1st next, and to make all selections necessary to satisfy its grant, within ninety days thereafter, and thereafter the withdrawals will be revoked.

An extension of this time for one year was granted by departmental letter of October 26, 1895 (L. and R. Press Book, 315 p. 315).

It will thus be seen that great liberality has been extended so as to preserve, as far as possible, the full quantity of the lands within the grant from which to satisfy, by selection, the amount granted.

It appears, however, from the report of your office, that entries have been erroneously allowed within the limits of the withdrawal maintained on account of this grant; to what extent I am not advised, but not a great many.

While it is clear that, technically speaking, these entries were improperly allowed, being in conflict with the withdrawal ordered by your office, yet no rights were acquired by the wagon road company by reason of said withdrawal.

As the lands granted were, by the terms of the act making the grant, "to be selected," no right was acquired to any specific tract until formal selection thereof had been made. Prior to this time, as before recited in this opinion, Bruner settled upon the land in question, and while I recognize the right of the company, under the grant, to make selection, yet I am of the opinion that under the supervisory power with which this Department is invested in the matter of adjustment of these grants, if, as it would seem, this grant can be fully satisfied without resort to this tract, shown to be improved to great value, the company should be required to select some other tract within the limits of its grant, not so occupied and improved.

It is not my purpose to authorize the continuation of the allowance of entries within the reserved limits, but, as to those tracts upon which entries or filings have been allowed, and the lands improved as shown in this case, that such tracts should not be awarded the company in the adjustment of its grant, if it can be satisfied without resorting thereto, and I have therefore to direct that all such entries be suspended to await the final adjustment of the wagon road grant.

The order for cancellation of all entries allowed subsequent to withdrawal, given in the case of Peter Clemons *et al.*, before referred to, is modified accordingly.

SWAMP LAND INDEMNITY CERTIFICATE—ACT OF MARCH 2, 1889.

STATE OF MICHIGAN.

The general provisions of the act of March 2, 1889, restricting the sale of public lands at private entry to the State of Missouri, did not contemplate the nullification of the special right conferred by the act of March 2, 1855, upon States to locate swamp indemnity certificates on lands that were at the date of said act subject to entry at one dollar and twenty five cents per acre.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (W. F. M.)

On October 30, 1895, the State of Michigan located 5,014.76 acres of land under swamp land indemnity certificate No. 7, originally issued May 21, 1887. It is not deemed necessary to describe the lands more fully than to state that they are situated in the Marquette district, neither is it considered a material fact that the location was made under a duplicate or certified copy of the original, the latter having been lost by the State.

The State has appealed from the decision of your office holding the location for cancellation on the ground that the certificate is only locatable on lands subject to private entry at one dollar and a quarter an acre, and that there are no longer any lands of that character in the State of Michigan.

The indemnity provision under the authority of which the certificate in question was issued is contained in the second section of an act entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March 2, 1855, that part of the section to which reference is had being as follows:

Where the lands have been located by warrant or scrip, the State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry at one dollar and a quarter per acre, or less, and patents shall issue therefor upon the terms and conditions enumerated in the act aforesaid. 10 Stat., 634.

This act is remedial as shown both by its title and its particular provisions and should be construed in such a manner as to effectuate its objects rather than to defeat them. Those objects are twofold, first, to afford relief to persons who had made entries of lands that had passed to the States under the swamp land act of September 28, 1850, 9 Stat., 519, and second, to indemnify the States for losses occasioned by such entries.

At the date of the passage of the act there were public lands in the State "subject to entry at one dollar and a quarter per acre" and it was unquestionably the intention of Congress that those lands should be utilized for indemnity purposes. By a later act (25 Stat., 854,) it was provided that "from and after the passage of this act no public lands of the United States except those in the State of Missouri shall be subject to private entry," but it is not conceivable that by this general provision it was intended to nullify a special statute enacted for a

remedial purpose. This conclusion is particularly irresistible in view of the attitude of the State in equity; for while it would not be accurate to say that the State has a vested right of indemnity location, yet it is strictly within the law to say that there existed a vested interest in the losses which are specified as the basis of the proposed location, and it is not thought to be going too far to lay it down that the State could not, without its consent, have been divested of its interest by any act of Congress.

This reasoning appears to be supported by late expressions of this Department, as in the case of *Swineford et al. v. Piper*, 19 L. D., 9, where it was contended that the fifth section of the act of March 3, 1887 (24 Stat., 556,) was repealed by the provision now under discussion, the following language is used:

It need only be said that the repeal of laws by implication is not favored, and, owing to the fact that the fifth section of the act of March 3, 1887, vested a remedy in those who had purchased of the railroad company in good faith, the Congress certainly had no intention of taking that remedy away before the Department could ascertain or pass upon it.

Again, in *Wheeler v. The Bessy Heirs*, 21 L. D., 518, in discussing the policy of the act, it is said:

Under said former policy (before March 2, 1889), any person who was, or who had declared his intention to become a citizen, could buy as much land as he could raise money to pay for, and secure title by "private entry" or "private cash entry." In this way non-resident speculators were absorbing numberless tracts of land; and holding them from cultivation, hoping to realize the "unearned increment" which would accrue from the labor of others in developing the country. This practice was against the policy of Congress which encouraged actual settlers in good faith and residents. Therefore Congress put a stop to it. The act of March 2, 1889, had no other purpose. It disturbed no bona fide rights whether vested or inchoate. It simply said that from and after its date, the practice of selling "offered" land to private persons for cash should be discontinued.

These conclusions render unnecessary any discussion as to the meaning of the descriptive phrase "public lands subject to entry at one dollar and a quarter per acre," and similar expressions, when found in general legislation.

The decision appealed from is reversed.

SECOND CONTEST—QUALIFICATIONS OF CONTESTANT—PRIORITY.

TAYLOR *v.* HENDERSON ET AL.

A second contestant who, in addition to the charge made in the prior suit, alleges that the contestant therein is disqualified as an entryman, is not entitled to be heard thereon during the pendency of said proceedings; and in the event of the cancellation of the entry under attack as the result of said proceedings, such contestant is entitled to no priority of right to proceed against the subsequent entry of the successful contestant.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (W. M. W.)

I have considered the case of *George W. Taylor v. John C. Henderson and William H. Duncan*, on the appeal of the former from your

office decision of February 9, 1895, rejecting his application to intervene in the case of William H. Duncan *v.* John C. Henderson, involving the NE. $\frac{1}{4}$ of Sec. 33, T. 17 N., R. 2 W., Guthrie, Oklahoma, land district.

In order to clearly understand the questions involved in this case it becomes necessary to refer at some length to the record in the case of John C. Henderson *v.* C. C. Holland, as well as the record in the case at bar.

On April 23, 1889, Holland made homestead entry for the tract.

On July 20, 1889, Henderson filed an affidavit of contest against Holland's entry, charging that Holland was disqualified to make entry of said tract by reason of having entered the Territory before noon of April 22, 1889.

A hearing was held, and the local officers found in favor of Henderson and recommended the cancellation of Holland's entry.

On January 19, 1891, William H. Duncan filed an affidavit of contest charging that both Holland and Henderson were disqualified to make entry of said land, and asked to be allowed to intervene and submit proof in support of his charges.

On January 20, 1892, your office affirmed the judgment of the local officers in favor of Henderson. At the same time it was held that Duncan's affidavit was not filed until after Henderson's; that Duncan's allegations against Henderson could not at that time be considered, and Duncan's application to intervene and contest Henderson's claim was thereupon refused, upon the ground that "no contest suit can be initiated against him prior to entry."

Holland appealed, and on November 17, 1893, the Department affirmed the judgment of your office, and directed the cancellation of Holland's entry.

Holland filed a motion for review of the departmental decision.

On February 19, 1894, Holland filed in the local office a withdrawal of his motion for review, then pending before the Department, and a relinquishment of his entry. At the same time, George W. Taylor made an application to enter said tract under the homestead law, which he claims was accepted, but which in fact was rejected. Taylor appealed to your office.

On March 3, 1894, Henderson applied to enter the land; but his application was not acted upon because of a vacancy in the office of the register of the local office.

On March 8, 1894, the Department returned to your office the papers in the case of Henderson *v.* Holland, without action on Holland's motion for review.

On March 22, 1894, your office closed the case of Henderson *v.* Holland, and directed the local officers to notify Henderson that he would be allowed thirty days to exercise his preference right of entry, and added: "You will in no wise affect the right of Duncan first and Taylor subsequently to attack such entry, if they so elect."

On April 4, 1894, Taylor filed a motion for review of this decision of your office, which was denied.

On June 2, 1894, Henderson made entry for the tract under his preference right accorded by your office letter of March 22, 1894.

On June 4, 1894, Taylor filed an affidavit of contest against Henderson's entry, charging, *inter alia*:

That one John C. Henderson claims said land by virtue of a contest. That said Henderson is not a qualified entryman for Oklahoma lands, for the reason that he admitted that he entered upon and came into the Oklahoma country, and on and across that part of it which is known as Payne county, O. T., on Friday and Saturday, April 19, and 20, 1889, and prior to twelve o'clock noon, central standard time of April 22, 1889, and is what is known in the Oklahoma country as a sooner, and is disqualified to enter said land.

He also claims under his homestead application of February 20, 1894.

On June 11, 1894, Duncan filed an affidavit of contest, charging that Henderson was disqualified from making entry by reason of having entered the Territory of Oklahoma within the prohibited period, and stating therein that he waived no rights acquired by his contest filed January 19, 1891, *supra*.

In pursuance of the instructions contained in your office letter of March 22, 1894, *supra*, the local officers ordered a hearing on Duncan's contest. Taylor filed a motion to be allowed to intervene in said case, reciting: (1) That on the 20th day of February, 1894, he made entry of said land, and (2) the filing of his affidavit of contest against Henderson's entry on June 4, 1894, *supra*. This motion was overruled by the local officers. Taylor appealed to your office, which, on February 9, 1895, instructed the local officers as follows:

This office has twice deliberately held that Duncan should first have an opportunity to proceed against Henderson and no good reason appears for now making a different ruling. You will, therefore, proceed with Duncan's contest against Henderson's entry as heretofore directed, and action on Taylor's contest will be suspended to await the final adjudication of Henderson's.

Duncan's application for entry and hearing filed January 19, 1891, his application of November 21, 1893, to enter, and his application of June 11, 1894, to contest, are herewith returned to serve as a basis of the hearing to be had on his allegations.

Taylor appealed.

In his appeal, Taylor claims that he made entry of the tract on February 20, 1894. This contention is not sustained by the record. He alleges error in your office decision: "In holding that the said William H. Duncan should have the first opportunity to proceed against the said John C. Henderson;" error "in directing the register and receiver to proceed with Duncan's contest against Henderson's entry, for the reason that said Duncan's contest is a second contest, and the entry of the said Holland was canceled by reason of the prior contest of the said John C. Henderson;" error "in directing that action on Taylor's contest be suspended to await final adjudication of Henderson."

In your office decision of January 20, 1892, it was held that Duncan's

allegations, in his affidavit of contest, against Henderson could not then be considered, for the reason that "any person may contest an entry, regardless of the fact as to whether he is a qualified entryman or not." This holding was clearly correct and proper. *Geisendorfer v. Jones*, 4 L. D., 185; *Lerne v. Martin*, 5 L. D., 259.

The question as to Henderson's qualification to enter land in Oklahoma could not properly be raised by Duncan pending Henderson's contest against Holland's entry. That question could only arise after the cancellation of Holland's entry and upon Henderson's application to assert his preference right of entry. *Saunders v. Baldwin*, 9 L. D., 391; *Hyde et al. v. Eaton et al.* (on review), 12 L. D., 157; *Hyde et al. v. Warren et al.*, 14 L. D., 587.

In regard to the entry of Holland, it is clear that Duncan occupied the position of a second contestant. His contest against Holland was based upon the same grounds as Henderson's, and was filed long after Henderson's case had been tried before the local officers. It has been held that a second contestant, whose application to contest is received and held pending the disposition of a prior suit on the same grounds, acquires no right under the act of May 14, 1880, in the event that the entry under attack is canceled as the result of a hearing ordered to determine all conflicting claims to the land in question. *Hyde et al. v. Eaton, supra*; *West Guthrie Townsite v. Cohn et al.*, 15 L. D., 324.

It follows that Duncan acquired no rights by virtue of his contest against Holland's entry, which was in reality virtually canceled as the result of Henderson's contest, although it nominally appears to have been canceled by relinquishment. Such relinquishment was made after the Department had decided the case against the entryman and directed the entry to be canceled. It is true, a motion for review was pending when the relinquishment was made, but this did not change or affect the judgment in any way. When Holland withdrew his motion for review, the judgment would in effect operate to cancel the entry. Such entry being properly canceled in favor of the first contestant, whatever rights the second contestant might have had prior to the cancellation were extinguished thereby.

After Henderson's entry was made it stood precisely upon the same footing as any other entry; it had no connection with Holland's entry that preceded it; as soon as it was made it became subject to contest on any proper ground, the same in all respects as any other entry; and the first contestant would have precisely the same rights against Henderson's entry as a first contestant against any other entry. Taylor filed the first contest against Henderson's entry, and is entitled to be heard first and to all other rights accorded a first contestant. The rights of contestants are given by law (act of May 14, 1880, 21 Stat., 140), and the Land Department has no authority to either enlarge or abridge such rights.

It follows that the action of your office was erroneous, in so far as it

held that Duncan acquired such a right as a second contestant against Holland's entry as would entitle him to be heard as against Henderson's entry as a first contestant, when the record shows that Taylor had actually filed a contest against said entry several days before Duncan filed his contest against it. It was also error to suspend Taylor's contest.

For these reasons, your office decision appealed from is reversed, and the papers in the case are herewith returned for further proceedings in harmony with the views herein expressed.

RAILROAD GRANT—INDEMNITY SELECTION—TIMBER CULTURE CLAIM.

ROMAINE *v.* NORTHERN PACIFIC R. R. CO.

The improvement of land, with the view to taking the same under the timber culture law, confers no right thereto, that will bar indemnity selection thereof.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (F. W. C.)

I have considered the appeal by Garrett Romaine from your office decision of September 20, 1895, rejecting his timber culture application covering the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 31, T. 11 N., R. 39 E., Walla Walla land district, Washington, for conflict with indemnity selection made by the Northern Pacific railroad company.

This land is within the indemnity limits of the grant for said company, and was included within its list of selections filed January 5, 1884.

December 27, 1888, Romaine tendered his timber culture application for this land, alleging that he had settled thereon February 18, 1878, and had since continuously cultivated and claimed the land. Upon said allegations hearing was duly held, at which both parties were represented. The testimony shows that this land was included under a common fence embracing about three-fourths of the section; that in 1878 the fence that included the land here in question was built and during that year Romaine broke twenty-five or thirty acres and has since increased the breaking to one hundred acres.

It has been repeatedly held by this Department that where settlement alone is depended upon to defeat the attachment of rights under a railroad grant, it must be affirmatively shown that the settler possessed the qualifications necessary to entitle him to complete claim to the land under the settlement laws.

In the case of Northern Pacific R. R. Co. *v.* Violette (19 L. D., 28), it was held (syllabus):

The occupancy and cultivation of a tract at definite location, by one who subsequently makes timber culture entry thereof, do not serve to except said tract from the grant if the entryman was not qualified to take the land under the settlement laws when the grant attached.

Again, in the case of *Northern Pacific R. R. Co. v. White* (19 L. D., 452), it was held (syllabus):

Possession and occupancy of a tract at date of definite location with intention to subsequently enter the land under the timber culture law, do not serve to except it from the operation of the grant.

So far as the record made at the hearing is concerned, it is not shown whether Romaine possessed the qualifications necessary to complete entry of the land here in question, under the settlement laws. It is shown, however, that he had no house upon the tract here involved.

From the record made in another case between the same parties, involving the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of said section 31, being the land immediately north of that here in question, it appears that upon the same date that Romaine tendered a timber culture application for the land here involved, he also tendered a homestead application for the tract immediately north and hereinbefore described. Upon this last mentioned application hearing was ordered, at which it was shown that Romaine settled upon that tract in 1878 and has since continued to reside thereon. His settlement upon that tract was held by departmental decision of May 14, 1896 (not reported) to be sufficient to reserve the tract covered by his homestead application from selection by the Northern Pacific railroad company.

It would appear, therefore, that his claim to the tract now under consideration, rests upon the fact that he had fenced the same in 1878 and has since improved the breaking done thereon, with an intention to make timber culture entry of the same. By these acts no such right was acquired prior to the tender of his timber culture application as would bar selection of the land by the company. As before stated, the company made selection of the land in 1884, more than four years before Romaine tendered his timber culture application, and as the regularity of the selection is not questioned by the record before me, I must sustain your office decision in rejecting Romaine's application for conflict with the selection by the company.

MINING CLAIM—PLACER LOCATION—DISCOVERY.

LOUISE MINING COMPANY.

Under the mining law a discovery of mineral on each twenty acres is required in the case of a placer entry by an association.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (P. J. C.)

It appears by the record that the Louise Mining Company made mineral entry No. 209, survey No. 2522, of its "placer mine," September 26, 1887, embracing 596.76 acres of land, in Marysville, California, land district.

May 26, 1890, your office directed the attention of the local office to the fact that the placer claim embraced four different locations and the five hundred dollars worth of improvements required by the statute were shown to be off the ground claimed and the applicant was required to show that the improvements were for the common benefit of all the claims.

By letter of December 23, 1891, your office acknowledged receipt of "additional evidence" showing shafts sunk on lots 41, 42, and 44, "but there is no evidence that discovery of valuable mineral has been made on lot 43." This was required.

Under date of February 24, 1893, the local office forwarded a corroborated affidavit showing the character and value of improvements upon the land in controversy, and on adjoining mining claims, for the alleged purposes of developing those entered.

By letter of April 3, 1894, your office notified the register and receiver that the additional evidence called for December 23, 1891, had not reached your office, and requiring it to be furnished; also that "said claimant must furnish evidence showing a discovery of mineral on each twenty acres in each location embraced in said entry."

In response to this the applicant filed the affidavit of the superintendent of the company, by which it is shown that he has

caused four bore holes to be made varying from two hundred and fifty feet to four hundred and ten feet in depth, one on each location of said placer mine; and that the same developed gold bearing gravel under the lava cap; that two shafts were also sunk of one hundred and forty feet and one hundred and sixty feet respectively and also a development tunnel was run about three hundred feet in length, all of which gave positive proof of the existence of an extensive gold bearing gravel deposit underlying the surface of the said placer mine;

that the work on adjoining claims "tends to develop and establish the richness and extent of the gravel deposit" in the land.

By letter of July 5, 1895, your office again considered the matter and held that "while said affidavit tends in a general way to establish the mineral character of the land entered" yet it was insufficient to show a discovery of mineral on each twenty acre tract. The entry was therefore held for cancellation except as to the twenty acre tracts on which discovery had been made. Also requiring segregation survey of such tracts and affidavit of five hundred dollars worth of improvement.

The appeal of the applicant brings the case before the Department, and the errors assigned are (1) in holding that it was necessary to show a discovery on each twenty acre tract; (2) in holding the entry for cancellation; and (3) in requiring any further showing of improvements.

The allowance of this entry was grossly erroneous in the first instance. There were four different locations, all located on the same day, to-wit, June 27, 1881, and the application for patent was made April 12, 1887. The return of the deputy mineral surveyor as to improvements is "a

bedrock tunnel near the north boundary run into the claim from the "Kenzie Ravine," a distance of 125 ft.; a cabin 12'x18', and a shaft 146 feet deep" was sunk on the adjoining claim. This shaft is shown to be 55.91 chains from corner No. 1 of lot 41 of the placer entry, and the bedrock tunnel is also off the land sought and is run in the direction of the same lot. This lot is on the extreme southwesterly end of the tract. There is nothing in the record as presented with the application for patent to show any improvement on either of the other tracts, or a discovery of mineral on any of them. There was no showing made of the annual expenditures required by statute on either claim, except for the year 1886, and that recites the identical work reported by the surveyor as quoted above, but in addition this affidavit says that but one-half the expense of both the shaft and tunnel was borne by the applicants.

It was not shown by the report of the deputy surveyor or otherwise, that there had been a discovery of mineral, either by exploration on the ground or by the bedrock tunnel which was then being run in the direction of the land. Neither was it claimed that the shaft, more than 3600 feet from the land, tended in any way to disclose mineral in the so-called placer mine in controversy. There was nothing presented in the local office that showed affirmatively that the land was mineral in character.

It is contended that the applicants complied with all "the then known regulations," in sinking the "four bore holes," one on each location. It will be borne in mind that these "bore holes" were made several years after the application for patent, and, incidentally it may be remarked, that the disclosures made by these holes is the only intimation of mineral on the land to this date. The Department is not advised of any "regulations" on the subject of discovery of mineral. This is a statutory requirement that cannot be enlarged or abridged by regulations.

In *Ferrell v. Hoge* (18 L. D., 81), it was decided that a discovery must be made on each twenty acre tract included in a placer location of one hundred and sixty acres. This decision was affirmed on review (19 L. D., 568), and has been approved subsequently in *Southern Pacific v. Griffin et al.* (20 L. D., 485), and in *Rhodes et al. v. Treas.* (21 L. D., 502).

I am not aware that any different rule ever prevailed. Counsel does not cite any authority in support of his proposition and research fails to disclose any such. This seems to me to be the plain and unmistakable intent of the statute. Congress intended by the mining laws to allow only the discoverers of mineral the right of possession of the mineral lands and the privilege of securing title thereto, and it makes no difference, in my judgment, whether twenty acres be located by one person, forty acres by two persons, and so on up to one hundred and sixty acres by eight persons, there must be a discovery of mineral in

every instance on each twenty acres, the acreage which each locator would be entitled to. The object in allowing an association to take more than the individual was not to avoid discovery, but solely for the purpose of permitting them to thus make a consolidated entry and by one system of development work all the land upon which mineral had been previously discovered.

Your office judgment is therefore affirmed.

SCHOOL LAND—INDEMNITY—SELECTION.

STATE OF CALIFORNIA.

The sale, by a State, of lands in fact excepted from its grant of school lands does not defeat its right to subsequently select indemnity therefor.

The decision in the case of *McNamara et al. v. State of California*, 17 L. D., 296, overruled.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 9, 1896. (J. A.)

I have considered the appeal of the State of California from the decision of your office of May 21, 1895, rejecting its indemnity school land application No. 1698, filed December 6, 1889, for all of Sec. 35, T. 14 N., R. 1 E., H. M., Humboldt, California, land district.

The first survey of township 13 N., range 1 E., H. M., was approved February 5, 1883. The State of California sold the land embraced in section 16 of the township under said survey, it appearing from the township plat of the survey that no part of the section was excepted from the grant of school land to the State.

July 30, 1889, a resurvey of the township was approved. The location of section 16 was not changed by the resurvey, but according to the plat of said resurvey the E. $\frac{1}{2}$, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, are within the limits of the Klamath River Indian reservation. These tracts, together with the NW. $\frac{1}{4}$ of Sec. 16, T. 13 N., R. 2 E., form the bases for said indemnity application No. 1698, for Sec. 35, T. 14 N., R. 1 E., H. M.

May 21, 1895, your office rejected the application, holding that, as the State had sold and patented the whole of Sec. 16, T. 13 N., R. 1 E., it has no right to make indemnity selection for that part of the section which is shown by the resurvey to be within the Klamath River Indian reservation.

That decision is based on the holding in the case of *McNamara et al. v. State of California* (17 L. D., 296). The facts in that case are as follows: The applications of *McNamara et al.* to make timber entries for certain tracts had been rejected by your office for the reason that the tracts had been previously selected by the State of California as indemnity in lieu of certain school sections shown by the plats of sur-

vey to be within the Klamath River Indian reservation. McNamara *et al.* appealed, alleging that parts of the school sections named as bases for the indemnity selections are outside of the reservation, and that therefore the bases are defective as a whole, and that the entire selection must fail. As it could not be determined from the record or from the township plats of survey whether any of the tracts designated as bases for the selection were outside of the reservation, it was directed by departmental letter of August 8, 1892, that a map of the Klamath River Indian reservation be prepared, showing accurately the limits of the reservation. The map prepared in accordance with said direction shows that certain tracts which were included in the bases for selections Nos. 1695 and 1696, then under consideration, and is the basis for selection No. 1698, now under consideration, are outside of the reservation. The plats of the townships within which said tracts are located, and by which the State of California was guided in making said selections, erroneously indicated the tracts to be within the reservation. September 21, 1893, the Department rendered decision as follows:

While it is shown that the bases for the selections 1695, 1696, and 1698 were defective, yet at the date of the selections the tracts now omitted were within the approximate limits of said reservation, as designated by the land office. All of the lands falling within said limits were treated by the Department as in reservation, and the State was evidently misled in designating said defective bases, because of the failure of the government to properly mark said limits.

At the date of the applications of appellants, the lands in controversy were embraced in the selections made by the State upon a basis *prima facie* valid, and, while a basis defective in part is defective as to the whole, yet, in view of the fact that the bases were at the time of the selection considered as in reservation, and as, under the act of February 28, 1891 (26 Stat., 796), the State may be held to have waived its right to the school sections by making selections in lieu thereof, I see no reason why, in view of the facts above stated, and of the provisions of the act of February 28, 1891, these selections should not be approved in lieu of the bases designated therefor, it not being in violation of any right acquired by appellants under their rejected applications, provided the State has not sold said bases.

It being alleged by appellants that some of the bases have been sold by the State, you will therefore notify it that upon furnishing satisfactory evidence that it has not conveyed or attempted to convey the bases designated for said selections, and filing a relinquishment of its right and title to such parts as are without the limits of the reservation, the selections will be approved; otherwise, the list of selections should be rejected and canceled.

Under the authority of that decision your office was justified in holding, in the matter under consideration in the case at bar, that the State of California, having sold all of section sixteen, no part of which was, according to the first plat of survey, reserved, has no right to make indemnity selection for that part of the section which is shown by the new plat of survey to be within the limits of the Klamath River Indian reservation.

After a fuller consideration of the question I have come to the conclusion that the rule announced in said decision, that the right of State

to make indemnity selection is defeated by its sale of the basis tracts, is erroneous.

The Klamath River Indian reservation was created by an executive order dated November 16, 1855. No right accrued to the State of California under its grant of school lands to the tracts which form the bases for the selection under consideration, although according to the first plat of survey they are outside of the reservation. The law provides for indemnity for such lands, and the Department can not hold that this right of the State has been forfeited through the fault of the government by which the State has been misled into selling the land, supposing its title to be good. The fact that the State has received payment for these lands from its grantees does not concern the Department in a question involving the State's right to indemnity.

An argument has been filed in this case in behalf of the grantees of the State of California calling attention to the fact that by the act of June 17, 1892 (27 Stat., 52), the lands within the Klamath River Indian reservation were opened to settlement and declared subject to entry; and urging that their title to the land under their purchase from the State be recognized and that no entries for the same be allowed.

The fact that the parts of section 16 which are within said reservation were, by said act of June 17, 1892, restored to the public domain has no bearing on the question at issue. The tracts are subject to homestead entry and the records of your office show that the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 16, T. 13 N., R. 1 E., is included in a homestead entry made May 21, 1894, by George Richardson, who claims a preference right under said act of June 17, 1892, alleging that he has been in possession of the land entered by him since 1877. There is no statutory provision or rule of law under which the grantees of the State of California can be recognized as having any right to these tracts, although through the fault of the government they have paid a valuable consideration for them to the State. The State of California could, for the protection of its grantees, claim said tracts, excepting said NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 16, to which a prior right has attached, under the last proviso of section 2275 R. S., under which a State may, instead of taking indemnity for lands excepted from its grant of school lands, await the restoration of the excepted lands to the public domain and then take the same under the grant; but it makes no such claim, can not be required to make such claim, and is, on its application now under consideration, entitled to make indemnity selection.

The decision in the case of *McNamara et al. v. State of California* is overruled in so far as it holds that the sale by the State of California of lands excepted from its grant bars its right to make indemnity selection.

The record shows that patents have issued for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 14 N., R. 1 E., being part of the lands which the State of California

applies to select as indemnity. These tracts are not subject to selection. As to the balance of section 35 the application must be allowed.

It will be observed, by reference to the case of *McNamara et al. v. California*, 17 L. D., 206, that the map prepared under the direction given by departmental letter of April 8, 1892, shows that the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 16, T. 14 N., R. 1 E., and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 16, T. 13 N., R. 2 E., being part of the bases for the selection under consideration, are outside of the reservation. In including said tracts in the bases for the selection the State of California was misled by the plats of survey of said townships 13 N., R. 1 E., and 13 N., R. 2 E., which erroneously indicate them to be within the reservation. If the State takes indemnity for said tracts it will be required, under the holding in the case of *McNamara et al. v. California*, *supra*, to file a relinquishment for the same.

The decision appealed from is reversed.

RAILROAD GRANT—SECTION 5, ACT OF MARCH 3, 1887.

NORTHERN PACIFIC R. R. CO. *v.* NORTH (ON REVIEW).

It appearing, on motion for review herein, that no application for the right of purchase under section 5, act of March 3, 1887, has been made, so much of the former departmental decision as passed upon said right of purchase is recalled and vacated.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 9, 1896. (F. W. C.)

With your office letter of March 31, 1896, was transmitted a motion, filed in behalf of the Northern Pacific Railroad Company, for review of departmental decision of February 4, 1896 (22 L. D., 93), in the case of the Northern Pacific Railroad Company and Nathaniel P. Hall *v.* Clarence C. North, involving the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 10 N., R. 36 E., Walla Walla land district Washington.

This tract is within the primary limits of the grant to said company on account of its main line, as shown by the limits adjusted to the map of definite location filed on October 4, 1880. It had been previously included within the limits of the withdrawal upon the map of general route filed August 13, 1870. At the date of the filing of the map of general route this land was embraced in a subsisting pre-emption filing of record, and for that reason was held to have been excepted from the operation of the withdrawal of general route. At the date of the filing of the map of definite location the land was in the possession and occupation of one Robert Mason, a qualified pre-emptor who purchased the improvements upon the land in 1872. Mason, it appears, held this land in connection with eighty acres in the adjoining even numbered section, and on October 6, 1880, two days

after the filing of the map of definite location, he filed his pre-emption declaratory statement for the eighty acres in the even numbered section. This claim was held to be sufficient to defeat the attachment of rights under the grant upon the filing of the map of definite location.

Upon the question of the company's rights the motion alleges nothing new, and so much of the departmental decision as held the land to be excepted from its grant is adhered to and the motion denied.

In this connection I note that both your office and this Department has passed upon another feature of the case growing out of this controversy, namely, Hall's right of purchase under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556).

Your office decision of May 25, 1894, states as follows:

The land in question having been excepted from the grant as stated above, and Clarence C. North having made settlement thereon subsequent to December 1, 1882, and prior to March 3, 1887, the application of Nathaniel P. Hall to purchase the land under the act of March 3, 1887, is defeated.

And in the decision under review it is stated:

After the passage of the act of March 3, 1887 (24 Stat., 556), Hall applied to purchase the land under the provisions of section 5 of said act . . . Hall's application to purchase was properly rejected and his homestead entry canceled.

The fourth ground of the motion under consideration is as follows:

The Northern Pacific Railroad Company sold this land in 1881 to Nathaniel P. Hall, who is an applicant before you to purchase under the 5th section of the act of March 3, 1887. At the date of his purchase Mason had clearly abandoned the land and North did not apply for it until March 18, 1884. It was error, therefore, not to allow Hall to purchase the land, even if you held same excepted from the company's grant.

Upon an examination of the case I am unable to find that Hall ever applied to purchase this land under the provisions of the act of March 3, 1887. North filed pre-emption declaratory statement for the land March 18, 1884, and on June 11, 1884, Hall made homestead entry therefor. February 4, 1885, North submitted proof under his filing, and Hall protested against the acceptance of the same, alleging that he had purchased the land from the Northern Pacific Railroad Company in 1881, and that North had not complied with the pre-emption laws. It was in this manner that the present controversy arose, and the proceedings in the case before the local office appear to have been closed prior to the passage of the act of March 3, 1887.

No application having been made to purchase under the act of 1887, so much of the departmental decision under review as passed upon Hall's right of purchase under said act must be recalled and vacated. The company's claim for the land will, however, stand rejected, and Hall's homestead entry will be canceled.

PRACTICE—FINAL DECISION—PETITION FOR RECONSIDERATION—RULE
114.

HAVIGHORST v. HARTWELL.

After the denial of motion for review or rehearing the Department will not re-open the case for further investigation, except upon such a showing as would warrant a court of equity in granting relief against the judgment of a court of law.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (W. M. W.)

On March 23, 1896, the attorneys for S. A. V. Hartwell filed in the Department a petition

for the exercise of the supervisory jurisdiction of the Department, in recalling the decision heretofore rendered in the above entitled cause, and to grant the defendant a new hearing therein.

Said petition alleges certain errors of law and fact in the departmental decision of the case of J. H. Havighorst v. Samuel A. V. Hartwell, decided adversely to Hartwell on the 11th day of October, 1895, and adhered to on review on January 13, 1896.

The petition is not accompanied by any affidavit showing that it is made in good faith and not for the purpose of delay, as required by Rule of Practice 78 relating to motions for rehearing and review.

Rule 114 provides that:

Motions for review, and motions for rehearing before the Secretary, must be filed with the Commissioner of the General Land Office within thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Each motion must state concisely and specifically, without argument, the grounds upon which it is based.

On receipt of such motion, the Commissioner of the General Land Office will forward the same immediately to this Department, where it will be treated as "special." If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the judgment before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained, and the parties notified, whereupon the moving party will be allowed thirty days within which to file an argument and serve the same on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer; after which no further argument will be received. Thereafter the case will not be reopened, except under such circumstances as would induce a court of equity to grant relief against a judgment of a court of law.

This rule is intended to cover every case that may be brought before the Department for final action, including, of course, the exercise of whatever supervisory authority the head of the Department may have over such matters under the law. Generally speaking, under this rule all controversies terminate and finally end when the Department acts on the motion for review or rehearing in any case, and thereafter the case will not be reopened, "except under such circumstances as would

induce a court of equity to grant relief against a judgment of a court of law."

In other words, whenever, after review or rehearing has been denied, the unsuccessful party can and does present to the Department such a state of facts and circumstances as would warrant a court of equity in enjoining the collection of a judgment of a court of law, then, and not until then, will the Department re-open the case for further investigation.

A brief reference to some of the authorities which govern courts of equity in granting relief against judgments rendered by courts of law may not be out of place in order to fully understand what is required by the latter clause of Rule 114, above quoted.

In Freeman on Judgments, section 485, pages 491 and 492, it is said:

In respect to the general grounds upon which the interposition of courts of equity may be successfully invoked to obtain relief from judgments or decrees, there seems to be a perfect unanimity of opinion. The actual adjudication of any question is in fact final, under all circumstances, unless corrected by some appellate tribunal; and is never subject to re-examination in any other than an appellate court, upon any issue of law or fact, nor upon the sole ground that the former decision is contrary to equity or good conscience. It is always a condition precedent to the proper action of a court of equity, in interfering with a judgment or decree not before it on appeal, that the facts be disclosed establishing that the matter now in the form of an adjudication is, in truth, without any fault of the party seeking to avoid its effect, a determination in which he could not present his cause of action, or his grounds of defense, as the case may be to the consideration of the court.

In section 487 it is said:

It has already been intimated that neither an erroneous conclusion, upon which a judgment was based, nor any irregularity of proceeding, not involving the jurisdiction of the tribunal pronouncing it, can have any effect in determining the question whether the judgment should be restrained in equity. Such beyond doubt is the law. "A court of equity will never set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law." Nor will this general rule be varied because the judgment was upon default, unless there was fraud or surprise or other good reason for the failure to defend, nor on the ground that the Supreme Court had overlooked or mistaken material facts shown by the record It is therefore conceded that equity will not interfere with a judgment on account of alleged irregularities occurring in the exercise of lawful jurisdiction.

In Story's Equity Jurisprudence, section 1572, it is broadly stated that a court of equity will never enjoin a judgment of a court of law upon the ground of mistake or error in the judgment of the court at law; or that the court of equity in deciding the same questions decided by the court of law would have come to a different conclusion.

Each and every question presented by the petition under consideration, whether of law or fact, has been fully considered by the Department, first on the merits, and then on review. The evidence is voluminous and conflicting in character. Hartwell has had full opportunity to present his defense, and has actually availed himself of such opportunity. The ultimate finding and conclusion of the Department were in harmony with, and concurred in, the respective conclusions of

your office and the local officers, that Hartwell is shown to be disqualified under the law to make entry of the land in question.

The petition utterly fails to bring the case within the Rules of Practice, or show that petitioner is entitled to any relief whatever. It is therefore denied.

PRICE OF LAND—RAILROAD GRANT.

DANIEL CAMPBELL.

Odd numbered sections within the primary limits of a railroad grant, but excepted from the operation thereof, must be held at double minimum, where such grant requires the alternate reserved sections to be sold at said price.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (F. W. C.)

I have considered the appeal of Daniel Campbell from your office decision of May 11, 1895, requiring him to pay an extra \$1.25 per acre on account of his pre-emption entry covering the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 35, T. 18 N., R. 1 W., Prescott land district, Arizona.

By your office decision "F" of December 8, 1890, this land was held to have been excepted from the grant made by the act of Congress approved July 25, 1886 (24 Stat., 282), for the Atlantic and Pacific railroad company, by reason of the fact that it was included at the date of the filing of the company's map of definite location within the Camp Verde Indian reservation.

The order creating this reservation was revoked subsequently to the definite location of the road, and this tract, being surveyed, was entered by Johnson November 6, 1886.

In the case of *Clarke v. Northern Pacific railroad company* (3 L. D., 158), in which was considered the question as to the price of certain lands formerly within the Crow Indian reservation and for that reason excepted from the grant to the Northern Pacific Railroad company, it was held (syllabus):

Where the statute, providing for indemnity, requires the double minimum price to be paid for the even sections, but fixes no price for the odd sections, lands in either odd or even sections, which may afterwards be disposed of, must be sold at the double minimum price, saving, however, the rights of settlers prior to withdrawal.

In the present case there is nothing in the record before me to show that Campbell would be protected by the saving clause in favor of those settlers who settled prior to withdrawal, and as the land is within the primary limits of the grant to the Atlantic and Pacific railroad company, your office decision properly held the same as disposable at the double minimum rate or \$2.50 per acre.

It is urged by Mr. Campbell that other persons entering lands similarly situated have been permitted to complete entry upon payment of \$1.25 per acre, for which they have received patent; but this fact, if admitted, would not be sufficient reason for further permitting the entry of land at \$1.25 per acre, which under the law is required to be disposed of at the double minimum rate.

Your office decision is affirmed and you will allow Mr. Campbell an additional thirty days from notice hereof, within which to comply with your office requirement, and in the event of his failure so to do, his entry will be canceled.

RAILROAD RIGHT OF WAY—SPECIAL ACT.

SPOKANE AND PALOUSE RY. CO.

The beneficiary under a special right of way act having abandoned its rights thereunder may avail itself of the provisions of the general right of way act of March 3, 1875, by due compliance with the terms thereof.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (A. M.)

With your letter of the 29th ultimo, you submitted a map filed by the Spokane and Palouse Railway Company under the act of March 3, 1875, 18 Stat., 482, and showing the definite location of a section of 12.29 miles of the line of its road on certain lands in Idaho formerly within the Nez Perces Indian reservation.

It appears that by the special act of May 8, 1890, 26 Stat., 104, a right of way was granted to this company through the then existing Indian reservation, that a map covering the right of way shown on the present map was approved under the special act on April 2, 1891, and that the company paid the Indians for the right of way acquired by the approval. The company, however, failed to construct its road as required and has abandoned any rights it may have acquired under the special act aforementioned.

The company, being a beneficiary under the general right of way act of 1875, now applies for a right of way thereunder, the lands in the reservation, outside of those covered by allotments, having become public lands.

The plats of survey of the townships crossed by the right of way were filed in the local office on October 26, 1895 (although your letter does not so state) and the map was filed therein on November 18, 1895. It is in proper form, has been approved as recommended and is returned herewith.

PRACTICE—DISPOSITION OF APPEALS—CURRENT BUSINESS.

SPECIAL ORDER.

Secretary Smith to the Commissioner of the General Land Office, June 11, 1896.

In addition to cases specified in departmental order of January 29, 1896 (22 L. D., 120), you are directed to transmit for disposition as "current work" all cases involving townsite entries.

In all cases classified as current work, when sending out notice of your decisions, you will inform the parties interested of that fact, and that the rules relating to filing arguments will be strictly enforced.

MINING CLAIM—PUBLICATION OF NOTICE—DESCRIPTION.

FRENCH LODGE.

The notice of an application for mineral patent will be held sufficient, in the matter of descriptive information therein, that complies substantially with the law and regulations in force at the time such notice is given.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (A. B. P.)

By decision of your office under date of June 22, 1895, relative to mineral entry No. 1930, for the French Lode claim, lot 2486, in the Consolidated Ten Mile mining district, Leadville, Colorado, made November 30, 1883, by Charles A. Luther *et al.*, and their application for patent therefor, you required the claimants to publish and post a supplemental notice of their said application for patent, for the reason that the former notice as published did not make mention of the connecting or tie line from corner No. 1 of the claim, which is shown by the survey to bear S. 54° and 1' W. 4393 feet to United States location monument Kokoma, your conclusion being, in substance, that in view of such omission the locus of the claim could not have been definitely ascertained by parties who might have desired to contest the same by adverse proceedings.

The Eli Mining and Land Company, alleging that it is the present owner of said French Lode claim, by one A. D. Searl, manager, filed an appeal from your said decision.

Several grounds of error are alleged, only one of which, however, is deemed material to the proper disposition of this case; and that is, in effect that the locus of the claim in question could have been and can be readily and definitely ascertained by reference to the connection made by the survey thereof with the approved survey of the adjoining claim, No. 2487, known as the Clara Lode claim, which has been duly patented to its owner.

The record shows that the survey of this claim was not only connected with corners No. 1 and No. 2 of the said Clara Lode claim but was also connected with United States location monument as stated in your said office decision. This latter connecting line was not mentioned, however, in the published notice. The records of your office show that the Clara Lode claim was carried to patent January 30, 1886, upon the said survey thereof, and upon a published notice exactly similar to the one here in question.

The United States surveys were not extended over the lands in the said Consolidated Ten Mile mining district until several years after the filing of the present application for patent and the publication of the notice under it. At that time the rules and regulations of your office did not require the survey of a mining claim located on unsurveyed land to be connected with a United States mineral monument, as has been the case since the publication of mining circular of December 10, 1891; and therefore the mention of such a connecting line in the published notice of application for patent could not have been required. Under the rules then in force a reference by course and distance to permanent objects in the neighborhood was deemed a sufficient designation of the locus of the claim by the survey, until the public surveys could be closed upon its boundaries. And while such rules and regulations enjoined great care in the preparation of such notice they did not expressly require that the references in the surveys to permanent objects should be stated in the notice (Copp's U. S. Mineral Lands, 37-39).

The notice in question appears to have been prepared with care. It refers to the connection of the claim with corners No. 1 and No. 2 of the previously surveyed Clara Lode claim as stated, gives minutely the metes and bounds thereof, shows its location with reference to the two other mining claims adjoining it on the east and south, and seems to be in other respects in accord with the rules then existing. I think it therefore a substantial compliance with the law and regulations in force at the time and should be held sufficient to carry the claim to patent if the claimant has complied with the law in other respects. The fact that the adjoining Clara Lode claim was patented in 1886 under the former rules upon a similar notice would indicate that your office at that time considered such a notice sufficient. In view of these things I do not think there exists any good reason for requiring the republication of notice, and your office decision is accordingly reversed. This is not to be considered as in any sense relieving applicants for patent since the publication of mining circular of December 10, 1891, from a strict compliance with the rules and regulations therein promulgated.

MINING CLAIM—ABSTRACT TITLE OF THE PURCHASER.

WHITE EXTENSION WEST LODE.

A mineral entry allowed on an abstract showing an absolute title in the applicant, and thereafter suspended on account of judicial proceedings apparently affecting said title, may pass to patent on the termination of said proceedings, and the consequent confirmation of the title in the applicant.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 13, 1896. (P. J. C.)

The record before me shows that Robert W. Nevin and James S. Nevin made application March 4, 1881, for the White Extension West Lode, survey No. 1155, Central City, Colorado, land district. On May 15, 1882, a supplemental abstract was filed in the local office showing the transfer of the property by the Nevins to Isaac Taylor and Charles C. Miles, and by the latter to the Lulu and White Silver Mining Company. On October 4, following, this company filed an application to purchase said lode claim, and on the same day mineral entry No. 2081 was made.

On June 23, 1883, one W. C. Baskin, attorney for Nevin *et al.*, addressed a letter to your office and enclosed a copy of a complaint filed in the district court of Clear Creek county, Colorado, wherein the Lulu and White Silver Mining Company was plaintiff, and Nevin *et al.* were defendants, alleging that the sum of \$12,000 was owing by the defendants and that the deed from defendants was given as security for payment of said sum within ninety days from date said sum should be demanded, and the prayer was that said deed should be adjudged and decreed to be a mortgage, for a foreclosure of the mortgage, and the sale of the premises. By letter from said attorney your office was asked to give its attention to this complaint and to suspend action on the application.

Your office by letter of June 17, 1883, held that there is no material discrepancy between the claim for a patent set up by said company as owner of said mining claim and the several averments in its complaint; that the suit was evidently brought for the purpose of quieting its possessory title and to remove any real or supposed cloud thereon. Mr. Baskin's objection was therefore overruled.

On May 12, 1894, your office again considered the matter and notified the register and receiver that

further action in this case will therefore be delayed until a final decree shall have been rendered in chancery proceedings now pending wherein said company is plaintiff and the applicants for patent are defendants.

Thus the matter seems to have rested until July 12, 1894, when your office again addressed a letter to the local office calling attention to the fact that a decree was made in said suit June 25, 1883, and that in order to properly dispose of the case it was necessary that the com-

pany should furnish satisfactory evidence of what action had been taken under said decree and requiring the company to furnish a certified copy of its articles of incorporation.

It is not deemed necessary to recite all the details of litigation in the local courts instituted by the mining company. Suffice it to say, that in response to your office letter of July 12, 1894, the company presented the decree of the district court, entered on mandate of the supreme court, reversing the judgment below sustaining the allegations of the complaint, and ordering the property involved to be sold by the sheriff, if the amount of money was not paid within a given period. The amount not having been paid, an order of sale was issued, and the property sold on May 5, 1888, to the plaintiff. Said sale was confirmed June 14, 1888 by the court, and attorney for the plaintiff asked further time within which to furnish sheriff's certificate of sale and copy of sheriff's deed. On consideration of the matter, however, your office by letter of April 27, 1895, held:

It having been finally determined by a court of competent jurisdiction, that the deeds relied upon by the entryman as evidence of the possessory title in making said entry were in effect a mortgage, it follows that at date of said entry the Lulu and White Silver Mining Company was not the owner of said White Extension West Lode claim.

Motion for review of this decision was filed and with it copies of sheriff's certificate of sale and the sheriff's deed to the plaintiff. Your office overruled said motion for review on the same ground and for the same reason given in your said letter of April 27, 1895. Whereupon the company prosecutes this appeal, assigning numerous grounds of error.

It seems to me to be unnecessary to discuss the many errors assigned by counsel for the reason that the case may be disposed of upon one ground alone. The supplemental abstract on its face showed absolute title in the mining company. There being no suit pending, the property not being in controversy at that time, the local officers were fully justified in permitting the entry to be made. It will be assumed that the mining company had possession of the property and has maintained it during all this period, there being no showing to the contrary, or any intimation that they have not been thus possessed.

Whatever may be said of the proceeding had in court, (10 Col., 357) whether it was for the purpose of foreclosing the mortgage, or to quiet the title, it is very clear that the title of the company by reason of this decree and sale is now perfect, and I see no reason why the entry should not be approved and passed to patent, if it is otherwise in conformity with law.

Your office judgment is therefore reversed, and the entry will be approved, if otherwise satisfactory.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT—SETTLEMENT.

WOOD *v.* TYLER.

A soldier's homestead declaratory statement is no protection to a prior settlement, but is in itself the initiation of a right to make homestead entry.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (E. B., Jr.)

Certiorari issued in this case September 18, 1895, at the instance of George F. Wood, for review here of your office decisions of October 20, 1894, and June 18, 1895 (the latter on review), in the case of said Wood and Charles N. Points *v.* Manuel Tyler, wherein a hearing was ordered to determine the question of priority of settlement as between Wood and Tyler, the land involved being the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 11 N., R. 7 W., I. M., Oklahoma City, Oklahoma, land district. Said Points is not a party to this proceeding, Tyler having relinquished the land in conflict between them, and the decision of the local office in favor of the former having also become final by reason of Tyler's failure to appeal from so much of the decision as related to the controversy between them. The said decisions of your office and the writ of certiorari set out all the material facts. The petition for the writ prays that the order for a hearing be revoked.

It appears from the record before me, among other things, that Tyler filed his soldier's declaratory statement for certain lands, including the tract in question, April 20, 1892; that Wood made homestead entry for the entire SW. $\frac{1}{4}$ of said section, October 21, 1892, having also, on April 21, 1892, initiated a contest against Tyler and one Bennett whose homestead entry of April 20, 1892, relinquished October 10, 1892, covered said quarter section; that Tyler made entry for the east half thereof October 18, 1892; and that Wood made settlement on the land covered by his entry on the afternoon of April 19, 1892, and has since complied with the law as to residence and cultivation. The purpose of the hearing was apparently to enable Tyler to show when he made settlement on the land claimed by him, his contention being that his settlement was prior to that of Wood, was protected by his said declaratory statement, and that therefore his right to the land in controversy was superior to that of Wood.

In view of the fact that Tyler did not make entry nor apply to make entry of the land until October 18, 1892, more than three months after his alleged settlement, and subsequent to the entry of Wood, it is material, in the face of Wood's settlement, contest, and entry, when Tyler made his settlement. He must stand, as a claimant for the land, either upon his rights under his soldier's declaratory statement, or, independent of them, upon his rights under his settlement and entry, or under his entry alone. However he may elect, the right of Wood is superior. Wood's settlement was prior to the filing of Tyler's

statement, if Tyler elects to stand upon his statement. If he elects to stand upon his settlement and entry, even conceding, for the sake of the argument, that his settlement was prior to that of Wood, he was fatally in default in failing to make entry within three months of his settlement, as against Wood's contest and prior entry. If he stands upon his entry alone, Wood's right is obviously superior.

The contention that Tyler's declaratory statement protected his settlement right is unsound. A homestead settlement upon surveyed land avails nothing as against an intervening adverse claim unless followed by entry within three months. Such settlement can not be protected by a soldier's declaratory statement, which statement has no relation to a prior settlement, but is itself the initiation of a homestead claim. The case of *Pickard v. Cooley* (19 L. D., 241) is directly in point and supports the views I have herein expressed.

A hearing in this case, in view of the facts and the law, is wholly unnecessary. The order for a hearing is therefore revoked, and the case remanded to your office for further appropriate action.

SETTLEMENT RIGHTS—UNRECORDED ENTRY.

HOSKING v. PEARSON.

In the case of an entry that is not of record in the local office the land covered thereby must be held as open to settlement and appropriation subject only to whatever rights may exist on the part of such entryman.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (C. J. W.)

September 27, 1887, John H. Pearson made homestead entry, No. 3731, for S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 9, T. 63 N., R. 9 W.

On September 28, 1887, Harley W. Judd made homestead entry, No. 3757 for N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 9 and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, T. 63 N., R. 9 W.

George Hosking filed affidavit of contest against Judd's entry, and on June 24, 1890, as a result of that contest, homestead entry, No. 3757, was canceled.

July 5, 1890, Hosking filed pre-emption D. S., No. 5320 for N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 9, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 10, T. 63 N., R. 9 W., and made final proof thereon September 27, 1892, and cash certificate and receipt were issued October 1, 1892,—No. 11939.

On June 24, 1892, Gustav V. Anderson made homestead entry, No. 6928, for the land covered by Hosking's declaratory statement and when the entry of Hosking was taken up for examination new publication was required by letter of May 20, 1893, of your office, also directing the adverse claimant to be duly cited. New publication was duly made and adverse claimants cited in the published notice and by registered letters, the letters being returned unclaimed, and the local

officers reported that no protest or objection had been filed against Hosking's entry. Upon said report Anderson's homestead entry, No. 6928, was, on November 29, 1893, canceled as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, T. 63 N., R. 9 W., and cash entry No. 11,939 of Hosking was held for cancellation as to the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 9 on the ground that at the time of Hosking's settlement the land was segregated by Pearson's homestead entry made in 1887. Hosking moved for review of your office decision, in which he alleged that Pearson had lost any right he might have had to the land in controversy by reason of the fact that he never settled, improved or resided upon any portion of the same; that at the date of his (Hosking's) settlement, the land appeared to be vacant unimproved public land, and the same appeared by the records of the local office to be unappropriated. That by his contest against Judd's entry and the preference right secured thereby, and by his filing without knowledge of the existing entry of Pearson and by his compliance with the law he has acquired an equitable right to the land in question, which should be recognized unless Pearson has a superior right, and that Pearson should be required to show cause why his homestead entry should not be canceled, or a hearing should be ordered to ascertain the facts in relation to Pearson's failure to comply with the law. On March 23, 1894, your office considered said motion for review and denied the same. On March 27, 1894, Hosking appealed from said decision to the Department. On April 6, 1894, your office held that said appeal was not filed within the time allowed by Rules 86 and 87 of Practice and declined to send up said appeal. On May 5, 1894, your office sent here an application, filed by attorneys for Hosking, for writ of certiorari. On August 31, 1895, said application was considered here, and your office was directed to certify and send up the record of the proceedings in reference to the cancellation of Hosking's pre-emption entry. Said order has been complied with, and I have now before me the record in said case.

The effect of said order is to leave the appeal of Hosking still pending and to be disposed of. While said appeal is from your office decision of March 23, 1894, in which your office declined to review its decision of November 29, 1893, in which Hosking's such cash entry was held for cancellation, it necessarily puts in question the correctness of your rulings in both decisions.

It appears that Pearson had an entry of record in your office for the land in question at the date of Hosking's filing, but for some cause it did not so appear in the local office and Hosking had no knowledge of it. If Pearson had followed up his entry by occupancy, cultivation, and improvements, there would be no question as to the correctness of the cancellation of Hosking's cash entry, but as against the bare fact, that Pearson had an entry of record, at the date of Hosking's cash entry, it is alleged that that fact did not appear of record in the local land office; that Hosking had no knowledge of it, and that the land

itself appeared to be unoccupied and unappropriated, and that Pearson had long since forfeited all rights conferred by the mere entry. These allegations are sworn to by Hosking, and the facts set out in his affidavit are duly corroborated by two other witnesses.

Appended to said affidavits is a certificate from A. J. Taylor, register of the land office, at Duluth, showing that as Pearson's entry appeared of record in said office it did not embrace the land in controversy. Hosking asks that Pearson be required to show cause why his entry should not be canceled, or that a hearing be ordered, at which said allegations may be inquired into. These papers are to be taken as a part of and ancillary to Hosking's appeal. The question presented is whether or not Hosking under the state of facts hereinbefore enumerated and alleged to be true, has such equitable right to the land as between him and Pearson entitles him to a hearing on these allegations.

In the case of *Linville v. Clearwater et al.* (10 L. D., 59), it was held in a similar case, that to every one except the first entryman the land was public and open, and that upon the relinquishment by the first entryman, that of the second should be reinstated. The reason for this was that the rights of the first entryman had become extinct by reason of his relinquishment, and the effect must have been the same if his rights had been lost through any other cause, as by abandonment of the land or failure to settle upon it, as in this case.

Under this view of the case, it was error to refuse to inquire whether or not Pearson had any subsisting right, which was superior to that of Hosking. Your office decision of the 23d of March, 1894, is accordingly reversed, and your office decision of November 29, 1893, so far modified as to conform to this opinion. A hearing is ordered at which the allegations against Pearson's entry shall be inquired into, and further action on Hosking's entry is hereby suspended to await the result of such hearing.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

RENO *v.* COLE.

The right of purchase under section 5, act of March 3, 1887, is not defeated by a settlement and entry made after the passage of said act, and with full knowledge of the prior adverse rights of the claimant under the railroad grant.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896.
(C. J. W.)

The N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 3, T. 3 S., R. 69 W., Denver, Colo.—the land in controversy,—is within the limits of the grant to the Union Pacific Railroad Company, its right to which attached August 20, 1869, the company listed it December 3, 1879, Amos Rand filed declaratory statement No. 1020, for said land May 23, 1865, alleging settlement in April, 1865. Evan E. Reno made homestead entry, No. 13,560, for the same, December 26, 1888.

In May, 1879, Lyman N. Cole caused notice to be published of his intention to submit proof of his right to purchase the land under the provisions of section 5, act of March 3, 1887 (24 Stat., 556). On July 5, 1889, the day named, he submitted his proof, and no one appeared to offer objections, but afterwards on July 13, 1889, Evan E. Reno filed an affidavit, in which he set forth the fact that he had made entry of the land in December, 1888, and settled on it in March, 1889, and had since resided continuously upon it, cultivating a portion of it, and had made improvements which Cole had destroyed. That he had not seen the notice of Cole's intention to make proof, and had no knowledge of the same until July 12, 1889, and asked for a hearing to enable him to appear and defend his rights. On December 20, 1889, the local officers denied his application for hearing, and an appeal was entered from said action.

On July 31, 1891, your office approved the action of the local officers, holding Reno's entry and the company's list for cancellation, and accepting Cole's proof as satisfactory. The case was appealed to the Department, and on August 9, 1892, the action of your office was affirmed as to the railroad company, but the case was remanded as between Reno and Cole for the purpose of allowing Reno, if he could, to show a valid reason why Cole's application to purchase should be denied, and his entry sustained, it being held that Reno was not properly notified of Cole's intention to make proof. (*Reno v. Cole*, 15 L. D., 174.) It was further held that the unexpired pre-emption filing of Rand made in 1865, had the effect of excepting the land from the company's grant, and as Reno's filing was not prosecuted to patent, the only other existing claim against that of Cole is the homestead entry of Reno. In accordance with said decision, after the cancellation of the company's list, your office directed the local officers to appoint a day for a hearing, and give notice to Reno and Cole. Hearing was accordingly had, commencing December 8, 1892, and closing January 27, 1893, both parties being present. On May 6, 1893, the local officers found in favor of Cole, and Reno again appealed to your office. On May 3, 1895, your office affirmed the decision of the local officers, and the case is here again on the appeal of Reno from said decision.

The appeal undertakes to specify five grounds of error, but they amount to nothing more than the general allegation that the decision is against the law and the evidence. As no fact found by the local office or your office is shown to be unauthorized, they will stand as correct. The local officers made the following statement of facts in their report.

From the testimony presented we find that Mr. Reno has known the land in dispute since the summer of 1883; that on June 17, 1885, he made timber culture application for the land, which was rejected by the local officers, but he claims that he never received notice of the rejection; that he made homestead entry, No. 13,560, for this land on December 28, 1888; that on the 26th or 27th of March, 1889, he hauled lumber on the land with which to build his house; that at the time he made his said entry the land was enclosed with something like 600 to 800 acres of other lands; that he hauled the lumber on this land through a wire gate that was in the fence around this land;

that he commenced to build his house on March 28, 1889, and so far completed it on that date that he commenced his residence therein on the evening of said date; besides the house he built a small barn and some sheds. That he attempted to plant and raise crops on the land and to build a fence round it, but was prevented by Cole and men in his employ; that the value of his improvements is about \$200; that he would have made better and more extensive improvements upon the place had he not been interfered with by Cole; that he has maintained a *bona fide* residence upon the land from the date of his settlement, to the date of the hearing of this cause; that he knew this land had been purchased from the railroad company by William A. Rand; that Rand had sold it to other parties, who in turn sold it to Cole; that Cole had purchased it about the time he (Reno) applied for it as a timber culture entry, and that Cole was in possession of and claiming it at the time he made his homestead entry.

This summary of facts touching Reno's claim seems to be fairly stated, from the record. Of Cole's claim it is said briefly:

On the other hand, it appears that Cole purchased the land in January, 1885, and took possession thereof at once; that he has extensive and valuable improvements thereon in the way of ditches, fences, reservoir, and the land seeded to alfalfa,—all estimated to be worth three thousand dollars.

The insistence of Reno is, that the act of March 3, 1887 (24 Stat., 556), will not avail Cole because of the proviso to section 5 of said act, which excepts settlements made subsequent to first of December, 1882. Said proviso has reference to settlements initiated between December 1st, 1882, and March 3, 1887,—the date of said act, and said proviso has no reference or application to a settlement initiated after the passage of said act. This ground of objection to the applicability of the act of March 3, 1887, must therefore fail, since Reno made no settlement upon the land until about March 28, 1889. The settlement then did not affect the operation of the act of March 3, 1887.

These facts stand out prominently: 1st. That Cole was a purchaser in good faith before the passage of said act, deriving title from the railroad company through those from whom he purchased. 2. That Reno had full knowledge of Cole's claim, purchase and improvements, and made his entry after the passage of the act of March, 1887. 3. That he obtained clandestine entrance inside Cole's enclosure when nearly all the land in dispute was in actual use and cultivation by Cole.

In the light of these facts what Reno terms his settlement on the land in March, 1889, looks more like a deliberate trespass than a lawful effort to found a homestead settlement on land subject thereto. He formerly made application to cover the land with a timber culture entry, which was abandoned when he made homestead entry, and is without significance in the case. The authorities cited by your office,—*Croke v. Stebbins* (14 L. D., 498); *Sethman v. Clise*, (17 L. D., 307); and *Norton v. U. P. Ry. Co.* (17 L. D., 314), support your finding, that Reno established no rights superior to those of Cole as a purchaser in good faith from the railroad company, and that the provisions of the act of March 3, 1887, applies to the case.

Your office decision is accordingly affirmed. The papers are herewith returned.

RAILROAD STATION GROUNDS—APPLICATION.

SANTA FE, PRESCOTT AND PHOENIX RY. CO.

An application for station grounds, properly rejected on account of an existing entry of the land involved, and awaiting action on appeal, will not attach on the subsequent cancellation of said entry, as the appeal does not operate to save or create rights not secured by the application itself.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (C. W. P.)

This record involves the right of the Santa Fe, Prescott and Phoenix Railway Company to file a plat showing its selection for station purposes, under the act of March 3, 1876 (18 Stat., 482), of 15.69 acres in the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 12, T. 7 N., R. 5 W., Prescott land district, Arizona.

The record of your office shows that said land is embraced in the homestead entry, No. 1078, of Thomas J. Little, made January 4, 1895.

On May 31, 1895, your office held that the land applied for by the company is not public, and therefore not within the operation of the act of March 3, 1875, *supra*, and returned the map to the local officers for delivery to the proper officers of the company.

The company appeals to the Department.

This appeal is based upon the following specification of errors:—

The records of the Land office show that the homestead entry of Thomas J. Little, numbered 1078, for the west half of north-west quarter of section 12, township 7 north, range 5 west, dated January 4th, 1896, was relinquished by said Little on the 16th day of July, 1895; and that therefore said land, during the pendency of this application became public land and subject to the right of the said Santa Fe, Prescott and Phoenix Railway Company to make said filing under act of Congress of March 3, 1875.

There is nothing in them. The land was not public land at the date of the decision of your office, May 31, 1895, rejecting the company's application. Since then, the records of your office show, Little relinquished his claim, and on the same day B. B. Castro made homestead entry No. 1169, of the same tract. The company's application was properly rejected by your office, and consequently was not a pending application, that would attach on the cancellation of Little's entry, as its appeal did not operate to save or create rights not secured by the application itself.

The decision appealed from is therefore affirmed.

RAILROAD GRANT—SECTION 2, ACT OF APRIL 21, 1876.

NORTHERN PACIFIC R. R. CO. *v.* SYMONS.

The confirmatory provisions of section 2, act of April 21, 1876, are not limited to entries made prior to the passage of said act, but are equally applicable to entries made thereafter.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (F. W. C.)

I am in receipt of your office letter of November 21, 1895, in the matter of the case of the Northern Pacific R. R. Co. *v.* Nathan D. Symons, involving the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35, T. 15 N., R. 4 W., Olympia, Washington.

The land here involved is within the limits of the withdrawal upon the map of general route of the main line of the Northern Pacific R. R., filed August 13, 1870, and is within the primary or granted limits upon the definite location of the road as shown upon the map filed September 13, 1873.

Prior to the receipt at the local office of the notice of the withdrawal upon the map of general route, to wit, on October 15, 1871, Sylvanus Symons, son of the present claimant, was permitted to make homestead entry of this land, which entry was canceled January 30, 1878.

Sylvanus Symons gave his improvements made upon this land to his father, who on November 22, 1882, filed pre-emption declaratory statement for this land, upon which he made proof and cash certificate issued January 10, 1884.

In considering said entry, as respects the railroad grant, your office decision of March 12, 1888, held, under the authority of the decision in the case of Northern Pacific R. R. Co. *v.* Burns (6 L. D., 21), that the entry of Sylvanus Symons was confirmed by the act of April 21, 1876 (19 Stat., 35), and served to defeat the railroad grant.

The Burns case was overruled by departmental decision of March 12, 1895 (20 L. D., 192), in which it was held that the confirmation of entries under section 1 of the act of April 21, 1876 (*supra*), is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely as against the right of the company, so as to except the land from the grant in favor of any other settler.

In view thereof your office decision was reversed by departmental decision of August 9, 1895, not reported, and it was held that Nathan D. Symons' entry

must be canceled unless upon the request of your office the company should relinquish its claim in favor of Symons, under the provisions of the act of June 22, 1874 (18 Stat., 194).

From your report it appears that the company was called upon and requested to relinquish its claim in favor of Symons under the act of

June 22, 1874 (*supra*), to which the resident attorneys for the company replied:

We advise that in view of the liberal policy pursued by the company towards all contestants against whom the Interior Department decides, in the matter of acquiring land by purchase, we do not deem it advisable to relinquish this land under the act in question.

In view of this action on the part of the attorneys for the company, you submit the matter for further instructions.

After a further consideration of the facts presented by the record in this case, I have concluded that Nathan D. Symons' entry is confirmed by the provisions of section 2, of the act of April 21, 1876 (*supra*), and that the company's relinquishment is not necessary to the recognition of his entry.

In your office decision of March 12, 1888, in view of the holding made in the Burns case, then being followed, it was unnecessary to consider more than the first section of the act of 1876, upon which said decision rested.

The reversal of the holding made in the Burns case, while it overrules the ground upon which you recognized the entry in question as against the grant, yet it does not fully dispose of the case, for by the second section of the act of 1876 it is provided:

That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

The facts presented in this case would seem to meet the conditions necessary to confirmation under this section.

Sylvanus Symons had an entry capable of confirmation under the provisions of section one, which he abandoned, and under the ruling in the Burns case his father, to whom he had transferred his improvements, was permitted to re-enter the lands under the pre-emption laws, with the requirements of which he has shown full compliance.

If the act is prospective then the second entry is confirmed.

In the case of the Northern Pacific R. R. Co. v. Crosswhite (20 L. D., 526), it was held that the confirmatory provisions of section one, act of April 21, 1876, are not limited to entries made prior to the passage of said act, but apply with equal force to entries made thereafter, and from the nature and relation of the two sections, the scope must be the same.

I have therefore to recall and set aside my previous decision in this case and, for the reasons herein given, your said office decision of March 12, 1888, is affirmed and patent will issue on Symons' entry under the provisions of section two of the act of April 21, 1876.

PRACTICE—NOTICE OF APPEAL—SERVICE.

STAPLES ET AL. *v.* ST. PAUL AND NORTHERN PACIFIC R. R. CO.

Notice of an appeal served by registered letter on the "land commissioner" of a railroad company is proper service on said company.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (F. W. C.)

Under date of May 9, 1896, Messrs. Britton and Gray filed a motion on behalf of the St. Paul and Northern Pacific railroad company, to dismiss the appeal from your office decision of January 31, 1895, in the case of Silas L. Staples *et al.* *v.* St. Paul and Northern Pacific railroad company, for the reason, as stated in the motion,

that a copy of said appeal was served upon Wm. H. Phipps of St. Paul, Minnesota, who, however, nowhere appears in the record of the case as representing said company and who is not its attorney.

Upon inquiry at your office it is learned that the certificate on file in your office as to the appointment of Wm. H. Phipps, as land commissioner of said St. Paul and Northern Pacific railroad company, shows that he was so appointed on March 29, 1895.

Under the decision of this Department in the case of Boyle *v.* Northern Pacific railroad company (22 L. D., 184), it must be held that the service upon Wm. H. Phipps, which was by registered mail, is a sufficient service and the motion under consideration is accordingly denied. You will so advise the company.

RAILROAD GRANT—HOMESTEAD ENTRY—WAIVER.

NORTHERN PACIFIC R. R. CO. *v.* MOEN.

The designation of a tract as the basis of an indemnity selection, at the time that the right to said tract is in dispute between the company and a homesteader, must be construed as a waiver of the company's claim in favor of the entryman.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (W. A. L.) (F. W. C.)

The case of the Northern Pacific Railroad Company *v.* Ole Olesen Moen is pending before this Department on appeal by Moen from your office decision of May 8, 1895, rejecting the final proof tendered on his homestead entry covering lot 6, Sec. 1, T. 27 N., R. 6 E., Seattle land district, Washington, and holding said entry for cancellation for conflict with the grant for the Northern Pacific Railroad Company.

From the recitation contained in your office decision it appears that this land was formerly included within the limits of the withdrawal made upon the filing of the map of general route of the branch line of said road, which map was filed August 15, 1873.

Upon the acceptance by this Department of the map of amended general route, filed in 1879, the company relinquished its claim to all lands formerly included within the limits of the withdrawal of 1873, which fell without the limits adjusted to the map of 1879. This tract fell without said limits and was formally restored to entry in 1879. One John S. Goodrich made homestead entry of the land May 2, 1884, which entry was canceled for abandonment December 5, 1887.

On September 3, 1884, the company filed its map showing the line of definite location of the company's road opposite this line, and this tract falls within the primary limits as adjusted to said line of definite location.

On December 5, 1890, Moen was permitted by the local officers to make homestead entry of this land, and after due notice by publication he tendered proof thereon June 12, 1891. On July 2, 1891, the company filed in the local office its protest against the acceptance of Moen's proof, which protest was, by the local office, overruled on September 30, 1891, from which action the company appealed to your office. During the pendency of said appeal, to-wit, on September 6, 1892, the company made selection of a tract within its indemnity limits, and specified the tract covered by Goodrich's entry as a basis on account of said indemnity selection.

In considering the company's appeal from the action of the local office, overruling its protest against the acceptance of Moen's proof, your office decision of May 8, 1895, appealed from, held as follows:

It is held by the Department that where a party settles upon, or enters a tract of land under the impression and information that it has been made the basis for indemnity selection of other land in lieu thereof, the company will be estopped from claiming otherwise, so as to defeat the claim of such party acting upon such information.

It cannot be maintained, I think, in this case, that Moen made his entry with the knowledge that the company had made the tract entered the basis for indemnity selection, and that the company was, therefore, estopped from claiming that said tract was not actually lost to its grant; as the list containing it was not filed until long subsequent to said entry. . . .

The company's indemnity selection, specifying this tract as a basis therefor, is clearly, therefore, invalid, and its erroneous action in the matter cannot be held to except the tract in question from its grant.

I must, therefore, reverse your decision, reject Moen's proof, hold his homestead entry for cancellation, and also hold for cancellation, as illegal, the company's said indemnity selection, above described, subject to appeal in sixty days.

The facts presented by this case show that the company, with full knowledge of the claim asserted by Moen to this land, and that its protest against the acceptance of his final proof had been rejected, selected a tract within its indemnity limits, specifying the tract covered by Moen's entry as a basis therefor.

Under the act of June 22, 1874 (18 Stat., 195), provision was made for the relinquishment by the company in favor of a settler who had been permitted to make entry of land within the limits of a railroad

land grant after the date of attachment of rights thereunder, and thereupon the company was granted a right to select an equal quantity of other lands in lieu thereof from any of the public lands, not mineral, within the limits of its grant and not otherwise appropriated at the date of selection, to which it would receive title the same as though originally granted.

For the present controversy, therefore, it might be admitted, which it is not my purpose to do, that the record, as disclosed, fails to show that the tract covered by Moen's entry was excepted from its grant, for with the knowledge of the allowance of Moen's entry, and the fact that he had tendered proof thereon, it made selection of other lands within the limits of its grant, as was possible either under the general indemnity privilege contained in its grant or the provisions of the act of June 22, 1874 (*supra*). While it is true that no formal relinquishment under the act of June 22, 1874, was filed by the company, covering this land, yet the result of its action amounted to a waiver of claim in favor of Moen, and should be so construed.

By its own act the company has rendered it unnecessary to determine whether or not this tract was excepted from its grant.

Moen's proof, if regular and satisfactory, should be accepted and his entry passed to patent. Your order holding for cancellation the company's indemnity selection based upon this tract is set aside. Your office decision is accordingly reversed.

CONFIRMATION—SOLDIER'S ADDITIONAL HOMESTEAD.

SIERRA LUMBER COMPANY.

The certificate of the register and receipt of the receiver issued on the allowance of a soldier's additional homestead entry are sufficient to bring such entry within the confirmatory provisions of section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 13, 1896. (W. M. W.)

The record has been examined in the appeal of The Sierra Lumber Company, transferee, from your office decision of June 4, 1895, holding for cancellation soldier's additional homestead entry for lots 1, 2, 3, and 4, Sec. 19, T. 29 N., R. 8 E., Susanville, California, land district.

On June 5, 1875, soldier's additional entry was made for the land in question, containing 147.04 acres, in the name of Roena Rippee, widow of Eli Rippee, deceased.

The original entry, on which this additional entry is based, contained forty acres. This additional entry is excessive to the amount of 27.04 acres, for which payment was made at date of entry. No evidence was filed in connection with the entry showing that Mrs. Rippee had not remarried prior to entry.

On December 2, 1889, Messrs. Britton and Gray filed in your office

the corroborated affidavit of Roena Rippee, in which she stated that she is the widow of Eli Rippee, who died in Wright county, Missouri, July 21, 1871; that she was married to Eli Rippee October 16, 1869; that Eli Rippee served as a soldier in Company F, 16th Missouri Cavalry, and was honorably discharged June 30, 1865.

By your office letter of July 25, 1890, the register and receiver of the local land office were directed to

notify all parties in interest that an affidavit showing that Mrs. Rippee had not married prior to entry, and that the relinquishment of one of the lots embraced in her entry will be required before said case can receive favorable action.

By your office letter of September 27, 1893, a copy of your office letter of July 25, 1890, was sent to the local officers, with instructions to give notice to the parties in interest that if the required evidence was not furnished within sixty days the entry would be held for cancellation.

In response to said office letter, the local officers transmitted to your office, on December 29, 1893, evidence tending to show the Sierra Lumber Company to be the transferee of Roena Rippee.

On December 16, 1893, the local officers transmitted a letter from the Sierra Lumber Company, the party in interest, in which it is claimed that the affidavit filed by Britton and Gray, *supra*, showed that the widow had not remarried.

On May 12, 1894, your office held the entry for cancellation, for the reasons that

it does not appear that the entrywoman was unmarried at the date of entry, and also because of the failure of the said entrywoman or party in interest to approximate the entry to one hundred and sixty acres as required.

The Sierra Lumber Company appeals.

The third and fifth specifications of error assigned are as follows:

3.

In not holding said entry confirmed by the 7th section of the act of March 3, 1891.

5.

In not approving the entry of Roena Rippee for patent as it now stands.

By irrevocable power of attorney, dated April 16, 1875, Roena Rippee empowered N. R. Chipman to sell and convey the land in question.

On June 5, 1875, under said power of attorney, Chipman conveyed said lands to Alonzo Haywood, under whom and by virtue of certain conveyances, decrees and orders in bankruptcy, the Sierra Lumber Company hold the title to it as transferee.

Your office decision held that:

The final certificate has never issued on this entry, and under the rule in the case of David Walters, 15 L. D., 136, said entry is not confirmed by section 7 of the act of March 3, 1891.

On the question as to whether the entry was confirmed under section 7 of the act of 1891, *supra*, the case of David Walters, cited in your office decision, followed the case of United States v. Bush, 13 L. D., 529.

In the case of William R. Sisemore, 18 L. D., 441, the Bush case was expressly overruled, and *pro tanto* the Walters case, so far as it relates to the question of confirmation under section 7 of the act of March 3, 1891, ceased to stand as an authority on such question.

The 7th section of the act of March 3, 1891 (26 Stat., 1095), confirms:

All entries made under the pre-emption, homestead, desert-land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there is no adverse claims originating prior to final entry, and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation of a Government agent, fraud on the part of the purchaser has been found, be confirmed and patented, etc.

In this case the application to enter was duly made by Roena Rippee, the register of the local office certified that she had paid all the fees and commissions prescribed by law, the receiver executed a receipt for the amount of the fees and commissions and one for the money paid for the excess of land over and above one hundred and sixty acres.

It is clear that the certificate of the register and receipt of the receiver executed in this case were sufficient to bring the entry within the confirmatory provisions of said section 7 of the act of March 3, 1891.

The entry will be passed to patent.

Your office decision appealed from is reversed.

HOMESTEAD CONTEST—SUSPENDED ENTRY.

BRUNETTE *v.* PHILLIPS.

The suspension of an entry, during the pendency of an investigation ordered to determine the alleged right of a prior occupant, relieves the entryman from the maintenance of his residence and improvements during the period of suspension. Where an entry is thus suspended, a contest initiated prior to the expiration of six months from date of entry, excluding the period of suspension, is premature.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 13, 1896. (C. J. G.)

This controversy is in relation to the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 28, T. 35 N., R. 27 W., Marquette land district, Michigan.

It appears from the record that on August 16, 1883, one James Chisholm made homestead entry for the above described land.

On June 21, 1888, Dominick Brunette, Jr. filed an affidavit of contest against said entry. A hearing was ordered for August 14, 1888, but neither party appeared, and no evidence having been submitted the contest was dismissed and the case closed. Your office, however, on March 18, 1891, of its own motion canceled Chisholm's entry, "on the ground of the entryman's failure to make final proof within the statutory period."

On March 25, 1893, John Phillips made homestead entry for said land. Prior to that date Brunette claimed and held possession of the same, but had never made entry.

On April 10, 1893, presumably as the result of Phillips' entry, Brunette filed an affidavit in the local office alleging prior right to said land. The said affidavit was transmitted to your office for instructions, and on May 4, 1893, the local office was "directed to 'reassume jurisdiction' of the case, and to take the proper action to 'bring on the issue, whatever it is.'" Your office also stated in said communication that:

While it appears, as the case now presented stands, that Brunette slept on his rights, there is also an appearance that Phillips, the present entryman, has made an entry of the land over the notorious settlement of another. . . . Phillips' H. E. 7042 as described, is suspended pending your further report, in due time, and action taken thereon.

A hearing was thereupon ordered, at which both parties appeared. After a consideration of the testimony the local office decided that Brunette's settlement on this land was not such as to lead the world to believe that he claimed it as a homestead; that he has done no building or cultivation on the land in question for the past five years except to cut the hay thereon in season. They therefore recommended the dismissal of his contest.

Brunette was notified of this decision on July 15, 1893. He filed an appeal therefrom on August 11, 1893, but notice was not served on Phillips until August 30, 1893.

On January 30, 1894, your office dismissed the appeal, for the reason that the same was not served on the opposite party within the time allowed by the rules of practice. A motion for a rehearing was considered and dismissed by your office at the same time, for the reason "that the same did not contain an allegation that it was made in good faith and not for the purpose of delay, as required by Rule 78 of Practice, and was not based on the ground of newly discovered evidence." The decision appealed from was held final, the contest dismissed, Phillips' entry held intact, and the case closed.

On April 18, 1894, Brunette filed contest against Phillips' entry, alleging abandonment, change of residence for more than six months after entry, and failure to settle upon and cultivate the land as required by law. A hearing was ordered for August 1, 1894, at which both parties appeared. After a consideration of the testimony the local office rendered the following decision:—

The defendant Phillips, just previous to the initiation of this contest and in anticipation of the initiation of the same, commenced to build a house on the tract in dispute; that this house was the first substantial improvement placed on the premises by him, although his entry was made on the 23d day of March, 1893; that Brunette, the contestant in this case, had cleared several acres of land and had raised crops thereon with his full knowledge before this start was made by him to build a house; that the evident intention of Brunette was to clear the land and make himself a home,

and his improvements on said land are valuable and substantial; that the tract has been rendered quite valuable by reason of his industry; that to now award to Phillips who has not in our opinion shown that good faith stipulated for in the homestead laws, the benefit of Brunette's work for several years would be a harsh exaction. We find that Phillips has remained a willing witness or observer of Brunette's work in improving this land ever since the date of the hearing in the first contest, while making no effort to improve the same himself, in the hope and expectation of reaping the benefits of said improvements. We find that Phillips has shown a total disregard of the rights of Brunette, has invaded his home and removed his goods therefrom without warrant or authority of law, all of which he now asks us to approve. We believe Mr. Phillips to be acting in bad faith with the government, and notwithstanding the fact that his entry had not been relieved from suspension six months before the initiation of this contest, we recommend that the same be canceled and that Brunette who has superior equities, be permitted to enter said tract.

On appeal your office, by letter of May 28, 1895, affirmed the decision of the local office, and held Phillips' entry for cancellation. Phillips has prosecuted a further appeal to this Department.

The rights of Brunette were fully adjudicated at the former hearing, in which your office decision of January 30, 1894, adverse to him was affirmed by this Department. The questions presented for decision therefore are as follows: (1) Was it the duty of Phillips to maintain residence and improvements during the period of the suspension of his entry. (2) Was Brunette's contest against Phillips' entry premature; and incidentally was Phillips prevented by threats of violence from maintaining his residence and making improvements after entry.

As stated in your office decision it is pretty well settled that the pendency of contest proceedings does not excuse an entryman from complying with the law as to these matters. But there is evidently a difference between the circumstances surrounding this case and those arising under an ordinary contest. The virtual effect of the suspension of Phillips' entry was to take him out of the case. In other words his entry was held in abeyance awaiting an investigation of Brunette's claim. So soon as that was determined Phillips' entry attached and not before. Phillips' case, in view of the fact that his entry was suspended pending an investigation of the occupant's claims, is certainly different from a case where a contest is filed charging laches on the part of the entryman. In the latter instance the entryman has already made his entry and established his residence, and until the charges are substantiated, is presumably living on and cultivating the land. In the case at bar the entryman, on account of the circumstances, was not able to maintain his residence, and it would be manifestly unjust to require him to make a showing of residence and improvements as urged in the contest affidavit. In fact it might very properly be claimed that on account of the suspension of his entry and threats of violence on the part of the occupant, Phillips was never able to establish his residence during the period in which abandonment is charged. An abandonment and change of residence imply and presuppose its prior establishment.

I am of the opinion therefore that the suspension of Phillips' entry, not being the direct result of a contest, and pending a hearing to determine the prior occupant's settlement rights, relieved him from the duty of keeping up his residence and improvements during the period of the suspension.

Was Brunette's contest of April 18, 1894, prematurely filed? In the case of *De Haven v. Gott* (18 L. D., 144) it was held:—

A contest against a homestead entry charging abandonment and failure to establish residence is premature if brought prior to the expiration of the period accorded under the law for the establishment of residence.

In the case of *Farnell et al. v. Brown* (20 L. D., 324) it was held—

A suspended entry does not run during the period of suspension, but it does run from its date to suspension, and then again, as if without interruption, from the date of the order revoking the suspension to the expiration of the term.

An entryman has six months after date of entry within which to establish residence. The record shows that Phillips' entry was actually alive only about four months. Phillips claims that he was not informed of the revocation of the suspension until March 23, 1894. This being true his entry was alive but little over two months.

On the revocation of an order suspending a desert entry, time will not run as against the entryman in the matter of reclamation, in the absence of proper notice to him of said revocation. *Farnell et al. v. Brown*, On Review, (21 L. D., 394).

This rule by parity of reasoning should apply with equal force to a homestead entry.

From the above it must be concluded that, where an entry is suspended pending a determination of alleged priority of right, a contest initiated prior to the expiration of six months from date of entry, not counting the period of suspension, is premature.

Phillips states that he moved to the land on April 18, 1894. Notice of contest was served upon him April 20, 1894. If his statement is true he was living on the land when notice was served.

A charge of abandonment against a homestead entry must fail where the entryman is residing upon the land when notice of the contest is served. *Neal v. Cooley* (18 L. D., 3).

In regard to Phillips' allegation that he was prevented by threats of personal violence from maintaining residence, it was held in the case of *Swain v. Call* (9 L. D., 22), that:

In order to constitute duress, the threats alleged must be such as are calculated to operate on a person of ordinary firmness in such a manner as to inspire a just fear of the loss of life, or great bodily harm.

Also in the case of *Dorgan v. Pitt* (6 L. D., 616) it was said:

Actual violence is not necessary to constitute duress. . . . Failure to establish and maintain residence, by personal presence on the land, cannot be construed as an abandonment when resulting from duress.

Phillips expressed his willingness to go on and improve the land, and was only prevented from doing so by fear of personal injury, and by

the order suspending his entry, which he regarded as a prohibition against any further action on his part. He had moved one load of household goods to the land and was preparing to take up his residence there when his things were thrown out of doors by Brunette. The counter charge is made that Phillips destroyed property belonging to Brunette. At any rate Phillips was compelled to leave, and soon thereafter Brunette filed his affidavit alleging prior settlement, and the former's entry was suspended. Even though there may be a question as to whether Phillips was the victim of duress under the definitions given in the cases cited, yet the threats taken in connection with the fact that Phillips' entry was soon thereafter suspended, afford a reasonable excuse for not maintaining the residence which he attempted to establish. The fact that Phillips had knowledge of Brunette's claim to this land was no bar to his making homestead entry of the same, provided he was honestly led to believe from circumstances that Brunette had failed to comply with the law for a number of years.

It is urged that the first substantial improvements were made by Phillips just prior to the initiation of contest. It is alleged, however, and the allegation is substantially supported by the evidence, that he conveyed logs to this land for the purpose of building a house as early as March or April, 1893. He afterwards used this material in building the house he was occupying at date of contest.

There is nothing to indicate that Brunette was officially notified of the cancellation of Chisholm's entry, and there seems to be no reason why he should have been, but he must have been aware that his contest had been dismissed. This fact should have put him on inquiry.

Your office decision is hereby reversed, Brunette's contest is dismissed and Phillips' entry will be allowed to remain intact subject to proper compliance with law.

ALASKA—APPLICATION FOR SURVEY—PAYMENT.

SURVEY NUMBER THREE.

If, under an application to purchase lands in Alaska, the survey is correctly executed in accordance with the terms of the contract, and the rules and regulations governing such surveys, the surveyor should not be made to suffer a loss of the pay for the work done because the application must be denied on grounds for which the applicant is responsible.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (W. C. P.)

With letter of September 25, 1893, you transmitted the papers relating to survey No. 3, Alaska, of a tract of land situated on the northeast shore of Chilkat Inlet made upon the application of Hugh Murray to purchase said land, said survey having been made by deputy surveyor George W. Garside.

When the plat of this survey was considered in your office certain objections thereto, or rather to the approval of the application to purchase in support of which the survey was made, were pointed out in your office letter of January 21, 1895, to the ex-officio surveyor general for Alaska, as follows:

The tract of land embraced in this survey while in the form of a square, includes more land than appears to be in actual occupancy by the claimants, besides including forty seven huts which the deputy says were erected by the natives.

It was suggested that the objections might be overcome by an amended survey upon certain lines pointed out, and the survey was suspended awaiting amendment.

Murray, the applicant to purchase, seems to have acquiesced in this disposition of the matter. George W. Garside and Charles W. Garside, however, entered a protest, asserting that the surveys had been made by them as required by law and in accordance with the instructions of the ex-officio surveyor general, the money to pay therefor having been deposited by the applicant to purchase, and that the suspension of the plats was prejudicial to their interests. They urged that said survey be approved and the accounts for the same be adjusted and paid out of the money deposited for that purpose. This paper contains allegations touching the merits of the application to purchase which only the applicant would be heard to make, and also as to the work of your office, which are without merit.

Your office replied to this protest under date of July 12, 1895, adhering to the conclusion theretofore announced, and advising the parties that the proper course would be an appeal to this Department. As a result of this advice the appeal in question taken by a party who has no interest in the land constituting the subject-matter of the proceeding, is before me.

The appellants have, however, an incidental interest in the case, because under the present conditions they are unable to secure compensation for their services in making the survey of the land in question. The work in connection with this survey was, so far as the record before me discloses, correctly executed in accordance with the terms of their contract and the rules and regulations of your office. If the work of a survey in such cases be correctly executed the surveyor should not be made to suffer a loss of the pay for that work, because of the fact that the application to purchase must be denied for some other defect. That would, however, be the effect of your decision, and because of this seeming injustice, I have concluded to entertain the appeal herein to determine whether relief can be given those parties.

Many of the various errors alleged are in respect to the merits of the application to purchase, and the greater part of the argument filed in support of the appeal is directed to those points. No question as to the merits of the application is properly before me and no such question will be discussed or considered at this time.

It is contended, however, that these appellants are entitled to pay for the work which was properly done, and that the plats prepared by them as a part of this work should be so far approved as to enable them to secure a settlement of their accounts and the payment of the amount found due them. Simple justice to them would seem to demand that this be done.

Sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), authorize the purchase of public lands in Alaska which are occupied for the purpose of trade or manufactures, not exceeding one hundred and sixty acres by any one person, to be taken as near as practicable in a square form, and require that one desiring to purchase shall make application to the ex-officio surveyor general for an estimate of the cost of making survey of the tract desired, and shall deposit in a United States depository the amount of the estimate; that the ex officio surveyor general shall thereupon employ a competent person to make such survey under such rules and regulations as may be adopted by the Secretary of the Interior, that the ex-officio surveyor general shall cause the field notes and plat of survey to be examined, and if correct, approve the same, and transmit certified copies thereof to the General Land Office; and that when the field notes and plats have been approved by the Commissioner of the General Land Office he shall notify the applicant, who shall within six months thereafter pay for such land. By section 14 of said act certain lands are excluded from the purchase under the two former sections.

Regulations to carry these provisions into effect were adopted June 3, 1891 (12 L. D., 583). It was provided that applications for surveys should be made in writing, setting forth the character of the land, its geographical position, the character, extent and value of the improvements, and that it is not so occupied or claimed as to prohibit its purchase; that if such application meet the approval of the ex-officio surveyor general he should furnish estimates of the cost of the work of surveying; and that the amount deposited for "field work" should be placed to the credit of said work to be "expended in the payment of the surveying accounts of the deputy surveyors when the surveys are accepted." These regulations embody quite specific instructions as to the manner of making the surveys and plats thereof as well as to the matter of proof to be made, after approval of the survey, in support of the application to purchase.

The survey in question seems to have been executed in strict conformity with these rules and regulations. This is all the deputy surveyor was responsible for, and having thus correctly performed his duties, justice demands that he should receive pay for his work. The practice, however, as shown by the action taken in this case, seems to be to hold him responsible not only for the corrections of his work, but also for the truth of the allegations made by the applicant as to the condition of the land, with respect to its occupation. The result would

be to deprive the surveyor of compensation, if the question of fact as to the occupation of the land be decided against the applicant, and in this case, that decision was made before any opportunity had been given for the submission of proof as required by the regulations.

I do not find anything in the rules that would prevent the recognition of a properly executed survey and plat thereof for the purpose and to the extent only of adjusting the surveying accounts. If there be anything to prevent such action, the regulations should be so changed as to allow that course to be taken.

The surveyor is not a proper person to pass judgment upon the question of fact as to whether the applicant is so occupying the tract applied for as to give him the right to purchase, or the one as to whether the tract or any part thereof is so occupied by natives or otherwise as to prohibit its purchase. The applicant must be held to know these facts, and should not be allowed to escape payment for the work of surveying the tract he applies for, should the facts show that his application cannot be granted. The payment for work done in consequence of his application is a small penalty to exact from one who seeks to purchase a tract that does not come within the terms of the law.

The papers in the case are herewith returned for your further consideration and such action as may be proper and necessary to the disposition thereof in accordance with the suggestions herein.

SOLDIERS' ADDITIONAL HOMESTEAD—RECERTIFICATION OF RIGHT.

J. S. PILLSBURY ET AL.

A recertification of a soldier's additional homestead right may be allowed in the name of a transferee, where the original certificate has been canceled, and it appears to have been held at such time by said transferee, who was entitled as a bona fide purchaser to the benefit of the remedial provisions of the act of August 18, 1894.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 13, 1896. (F. W. C.)

With your office letter of March 28, 1896, was forwarded an application, filed on behalf of J. S., George A., and Charles A. Pillsbury, for a recertification of the certificate of additional right issued in the name of Sanders P. Perry on March 12, 1883, under section 2306 R. S., for 120 acres.

Said certificate was located in the interest of the parties before named at the Duluth land office, Minnesota, on December 30, 1892. Upon an investigation, instituted by your office, said location was held for cancellation because found to have been located by means of a fraudulent power of attorney. An appeal was taken to this Department,

resulting in the decision of January 31, 1895 (20 L. D., 91), in which it was held (syllabus):

A soldier's additional homestead entry made under a certificate of right and power of attorney after due notice of the illegality of the certificate, and fraudulent character of said power, and subsequent to the exercise of the soldier's right in person, is invalid, and must be canceled.

A motion, filed for a review of said decision, was denied in departmental decision of April 27, 1895 (20 L. D., 419), in which it was held (syllabus):

The act of March 3, 1893, authorizing a purchaser under a soldier's certificate of additional right to perfect title by paying the government price of the land, where said certificate is found invalid, is not applicable to a case wherein the certificate is held under a fraudulent power of attorney, and where an adverse claim thereto is asserted, and exercised, by the soldier in person prior to the location under said certificate; nor do the remedial provisions of the act of August 18, 1894, extend to an additional entry thus secured in fraud of the soldier's right.

The application now under consideration is supported by affidavits showing that in 1887 the certificate of additional right, issued by your office in the name of Sanders P. Perry, was purchased by George A., Charles A., and J. S. Pillsbury from S. A. Kean and Co. of Chicago, Illinois, the consideration therefor being \$3,600, or at the rate of \$30.00 per acre, and that this purchase was made in good faith, without knowledge of any defect or fraud in the matter of the execution of the power of attorney under which the sale was made.

It might be here stated that the supreme court has recently, in the case of Alfred F. Webster *v.* Milo J. Luther *et al.* (163 U. S.,), held that the certificates of additional right issued under section 2306 R. S. are assignable.

In the case of John M. Rankin, on re-review, decided November 6, 1895 (21 L. D., 404), it was held (syllabus):

It was the intention of Congress in the act of August 18, 1894, to validate all outstanding certificates of soldier's additional homestead rights in the hands of *bona fide* holders.

One who buys a certificate of additional right without notice of the illegality of said certificate at its inception, or of its invalidity for any other reason, is a *bona fide* purchaser under said act.

Under this decision it must be held that this Department erred in its decision of April 27, 1895, holding that the certificate here in question was not covered by the remedial provisions of the act of August 18, 1894, and to that extent said previous decisions upon the certificate of right here in question is recalled and vacated.

Upon inquiry at your office it is learned that, following the decision of this Department of April 27, 1895, the certificate of additional right issued in the name of Sanders P. Perry, together with the location based thereon, were canceled, and that the land covered by the said location has since been disposed of.

In view of this fact it is directed that the application for recertification of soldier's additional right be allowed in the name of J. S., George A., and Charles A. Pillsbury, as transferees, as contemplated by the act of August 18, 1894.

Herewith is returned the application and accompanying papers for the action of your office in accordance with the directions herein given.

PRACTICE—NOTICE—SERVICE BY PUBLICATION—TRANSFEREE.

EX PARTE CHARLES C. McIVER; AND NEVVIEW *v.* ROCK ET AL. (ON REVIEW).

Failure to show diligence in attempting to secure personal service, prior to securing an order of publication, can not be set up on behalf of a non-resident transferee. A transferee, who fails to file in the local office evidence of his interest, is not entitled to notice of proceedings against the entry under which he holds.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 13, 1896. (C. W. P.)

With your office letters of June 14, and 15, 1895, you transmitted motions for review, upon the part of Alexander Michaud, transferee of Charles Sextion, of Joseph Nevview, of Myron W. Fields, and of W. T. Bailey, in the case of Charles C. McIver, *ex parte*, and Joseph Nevview *v.* William Rock and others (consolidated), decided by the Department on April 18, 1895, and reported in 20 L. D., p. 380.

The land involved is the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 33, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 28, township 59 N., range 15 W., Duluth land district, Minnesota.

The decision complained of held that the notice by publication to Henry Stephens, transferee, through mesne conveyance, of Joseph Roeinski, the entryman, was fatally defective, for the reason that

no effort appears to have been made with reference to Stephens, nor is there any affidavit on record, showing he could not be found personally, or that any effort was made to find him, nor that he was not a resident of the State,

and directed your office to issue an order to William Rock to show cause why his record entry should not be expunged, and that of Roeinski reinstated.

The record shows that on April 12, 1881, Joseph Roeinski filed a declaratory statement for said land, alleging settlement on April 6, 1891, and that on November 10, 1881, Joseph Roeinski made pre-emption proof, paid for the land, and received certificate.

On October 23, 1888, an affidavit of contest was filed against said entry by Ellen Hafto, which was supplemented by another affidavit on May 8, 1889.

A hearing was had, and on November 3, 1890, Roeinski's entry was canceled. Nine days after the cancellation William Rock made homestead entry of the land, and on October 24, 1891, made final commutation proof.

On June 15, 1892, C. C. McIver, administrator of Henry Stephens, deceased, filed a petition for the reinstatement of Roeinski's entry, alleging that Henry Stephens, on July 20, 1883, for a valuable consideration and in good faith, purchased the land, through mesne conveyance, from Roeinski; that Stephens died in California on February 4, 1886; that he (McIver) was appointed sole administrator; that the estate of Stephens had no notice of the contest proceedings brought to annul Roeinski's entry.

On January 13, 1892, Joseph Nevview filed an affidavit of contest against Rock's entry, charging that said entry had not been made in good faith, but fraudulently for the benefit of another. A hearing was had on said affidavit of contest, and on February 17, 1893, the local officers found in favor of the contestant, and recommended the cancellation of Rock's entry.

By your office decision of November 25, 1893, the petition of McIver was denied, and the entry of Rock held intact.

From this decision McIver and Nevview appealed to the Department.

The question for consideration upon these motions for review is, whether the notice of contest given to Henry Stephens, the transferee, is sufficient.

The petition of the administrator of Henry Stephens alleges that Stephens purchased the land on July 20, 1883, which was more than five years before Ellen Hafto initiated her contest.

Under the rules of the Department, Stephens had the right, and it was his duty, to file in the local office evidence of his interest and his claim to have notice of proceedings affecting his rights. (*Pierse v. Carthrae*, 19 L. D., 435.) The entry was not canceled until November 3, 1890, more than seven years after Stephens purchased the land, and the petition for reinstatement of entry was not filed until June 15, 1892. During all this period neither Stephens nor his personal representatives made any application to intervene or gave notice of their claim. What right, then, have they to have Roeinski's entry reinstated? They do not deny—they admit—that Stephens was not a resident of the State of Minnesota; they do not claim that personal service could have been made upon him in the State of Minnesota. In fact, he was in his grave when Ellen Hafto filed her affidavit of contest, on October 23, 1888, having died, as it is alleged, in California on February 4, 1886. It is alleged that the estate of Stephens had no notice of the contest. But Ellen Hafto was under no obligation to give notice to any one, except the entryman. Finding from the land records in St. Louis county, Minnesota, that on the 20th of July, 1883, the land had been transferred, through mesne conveyance, to one Henry Stephens, of Detroit, in the State of Michigan, she made him a party defendant, and gave the notice by publication, which is set out in page 382 of 20 L. D. It is said that this notice is not sufficient to bind the personal representatives of the transferee, who, it is admitted, was not a resi-

dent of the State of Minnesota at the date of the transfer, and, it is alleged, had died in California before the filing of the affidavit of contest.

Rule 9 of Practice provides that:

Personal service shall be made in all cases when possible if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served.

And Rule 11 is as follows:

Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service cannot be made. The party will be required to state what effort has been made to get personal service.

These rules are interpreted in *Jones v. De Haan*, 11 L. D., 261, and in *Olsen v. Eagan*, 21 L. D., 277. In the former, it is held that when a party to be served with notice is a non-resident of the State or Territory in which the land is situated, it is not necessary to show that any effort was made to make personal service upon him. In the latter, it is held that when a party is shown to be a non-resident, a formal order of publication by the local officers is not necessary; that it is sufficient if they authorize the publication verbally; that if it appears that the service by publication was acquiesced in by the local officers, and the showing made was such as would justify the use of the discretionary power conferred upon them by the rule, their jurisdiction is complete. And in the case of *Pankonin v. Crook*, 5 L. D., 456, it was held that a claimant who then admitted that he was a non-resident of the State when the notice by publication was given, could not be heard to say that the contestant had not used due diligence in attempting to secure personal service.

In the case at bar, the transferee had not entitled himself to notice of the contest. He had placed the contestant under no obligation to give him notice. But the records of the county of St. Louis, showing that there was a conveyance of the land to Henry Stephens, of Detroit, in the State of Michigan, on record, the contestant gave the notice by publication, which the rules of practice prescribe for non-resident parties.

Under these circumstances, I am of opinion that the notice is sufficient to bind the representatives of the transferee, who by their own negligence lost whatever rights they or Stephens, under whom they claim, may have had.

In the case at bar, it is shown that both the entryman and the transferee had notice of the proceedings upon which the entry was canceled, and the land department had thus acquired jurisdiction to cancel the entry; in such case an order of cancellation is final, and takes the case out of the confirmatory provisions of the act of 1891, *supra*, for the reason that there is no existing entry at the passage of the act, on which it can operate. *Drew v. Comisky*, 22 L. D., 174.

For these reasons, the decision under review is hereby revoked and set aside; the petition of C. C. McIver denied, and the case of Joseph Nevview against William Rock, on appeal from your office, is reserved for future consideration.

VACANCY IN LOCAL OFFICE--APPLICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 13, 1896.

Registers and Receivers, U. S. Land Offices.

Upon the occurrence of a vacancy for any reason in the office of register or receiver at any of the district land offices all business requiring the action of both officers must await the filling of the vacancy, and while the office is kept open for the purpose of furnishing general information, no action can be taken upon applications to contest or enter lands in that district.

Applications to contest entries or to enter lands and all other applications requiring joint action of both officers which may be presented during the vacancy in the local office will be received, the time of presentation noted thereon, and upon the resumption of business such applications will be disposed of in their order.

E. F. BEST,
Acting Commissioner.

Approved:

HOKE SMITH, *Secretary.*

MINING CLAIM--PURCHASER PRIOR TO PATENT.

WINGATE PLACER.

The purchaser of a mining claim after entry, but prior to patent, takes the land subject to all the infirmities of title, so far as the government is concerned.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896. (P. J. C.)

It is shown by the record before me that Quincy Woodcock *et al.*, on December 20, 1880, made application for patent for the Wingate Creek Placer mining claim, lot No. 38, containing 129.19 acres, Humboldt, California, land district; that during the period of publication a protest and adverse claim was filed, and in due time suit was instituted. Judgment was rendered in favor of the adverse claimant.

On May 13, 1886, George B. Temple, one of the original applicants, the title having vested in him, made mineral entry No. 69 of said lot 38, and also of lot 59, containing 60.27 acres.

July 25, 1888, your office addressed the local office, calling attention to several errors in the record. Those that have been corrected or waived will not be referred to here. Among other things required of the applicant was an amended survey with plat and field notes to show the conflict with the Last Venture Placer, the successful adverse claim. On the same date the surveyor general of California was directed to prepare,

at the expense of the claimants, an amended plat and field notes of survey, showing in manner prescribed by existing instructions the exclusion of that portion of the claim, awarded to said adverse claimants, as shown by the amended survey of said Last Venture placer claim, giving the correct area of the claim.

Thus the matter seems to have rested until March 28, 1894, when your office called for a report from the local office as to the things required by your letter of July 25, 1888.

In response thereto the attorney for the present owner of the Wingate Placer responded and declined to have the resurvey made. Thereupon your office, by letter of July 13, 1894, directed the local office to require the owner to show a discovery of mineral on each twenty acre tract included in his entry, and make the amended survey as ordered. He was allowed sixty days within which to do these, "in default of which said entry will be held for cancellation."

On January 28, 1895, your office called for a report on the order requiring the additional evidence, and if the same had not been furnished the parties would be allowed sixty days in which to furnish the same, in default of which the entry would be canceled without further notice. No response having been made the entry was held for cancellation March 30, 1895, whereupon the present owner prosecutes this appeal.

The assignments of error raise but one question, and that is, that as against the present owner the Department is without authority to act in the premises, for the reason that he is a purchaser in good faith after final entry.

In answer to this it is sufficient to say that until patent has issued the Department has full and complete jurisdiction over all entries not confirmed by statute, and persons who purchase on the faith of the receiver's receipt do so at their own risk and take the land subject to all the infirmities of title, so far as the government is concerned.

Your office judgment is therefore affirmed.

RESIDENCE—LEAVE OF ABSENCE.

MAY LOCKHART.

When the conditions named in section 3, act of March 2, 1889, are made to appear to the local office, a leave of absence should not be denied for the reason alone that no period of personal presence on the land has intervened between the expiration of a former leave, and the application for a second or subsequent leave.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896.
(R. F. H.)

May Lockhart (formerly Bolin) appeals from your office decision of April 2, 1895, affirming the action of the local office of September 6, 1894, denying her application of the same date for a second leave of absence from her homestead entry No. 14621 for the SE. $\frac{1}{4}$ Sec. 1, T. 7 S., R. 36 W. Colby land district, Kansas.

The facts are sufficiently set forth in your said office decision.

The following is claimant's affidavit for her second leave of absence.

May Lockhart, formerly May Bolin, being first duly sworn says that she is the identical person who made homestead entry No. 14621, Oberlin, Ks., series, on the 1st day of March, 1892, for the SE. $\frac{1}{4}$ Sec. 1, T. 7 S. range 36 west. That she established her actual good faith residence upon said tract of land on the 1st day of July, 1892, and resided thereon continuously with her husband up to the 4th day of September, 1893, and under a leave of absence granted the 26th day of August 1893, this affiant with her husband and family removed from said tract temporarily to Decatur county Kansas, and put in a crop the present season of seventy-five acres of corn, oats, millett, and potatoes, all of which crop, by reason of extreme drought, is an entire failure except some corn fodder sufficient as this affiant believes to winter her stock and that of her family, consisting of six head of cattle and three head of horses, but raised no grain of either kind so planted.

This affiant further says that she has caused to be broken and cultivated to crop on her said homestead eighty-five acres and has constructed and occupied thereon a comfortable dwelling of two large rooms and well furnished. A good well of water, said well being one hundred and fifty feet deep. A cellar twelve by twelve feet in size well finished. A good sod stable twelve by sixteen hen house twelve by fourteen and a large four wire corral.

That said cultivated land was planted to crop in 1892, and that all of said eighty-five acres on said homestead was in 1893, planted to corn, rye, oats, millett and cane, and wheat and well cultivated and tended and that by reason of extreme drought all of said crop was a failure this affiant having sold all that grew on said eighty-five acres in said season for the sum of twelve dollars.

This affiant further says that all kinds of crops planted in the season of 1894, in the vicinity of said homestead is by reason of extreme drought a complete failure and that in all human probability if the whole of said eighty-five acres had been by this affiant planted to crop of any kind in this season of 1894 all of the same would have been a total failure by reason of the extreme and unusual drought that destroyed all crops in the vicinity of said homestead.

Further that this affiant is compelled to depend for support of herself and family upon her own labor and the labor of her husband and that their stock cannot by reason of prevailing conditions be sold at any reasonable price and that if she and her husband be compelled to reside upon said homestead the coming winter said stock will surely perish for want of feed but that if permitted to remain where they

now are and to be absent from said homestead she will be able to keep said stock through the coming winter and that said feed is more than ninety miles from said homestead.

Further that there is no labor to be secured by this affiant or her husband in the vicinity of said homestead and that by reason of the two successive failures of crops as above described this affiant and her husband have exhausted their available means and must depend upon labor to be secured for support.

Wherefore this affiant asks that she may be granted a leave of absence for the period of one year, that is, from the 28th day of August 1894, to the 28th day of August 1895, as provided by act of Congress approved.

This affidavit is supported by the joint affidavit of two witnesses who testify that from their personal knowledge the statements and allegations contained therein were true.

The papers appear to have been duly executed in accordance with your office circular of March 8, 1889 (8 L. D. p. 314), and September 19, 1889 (9 L. D., p. 433).

The register and receiver rejected the application on the ground that claimant had failed to establish residence on land in question since expiration of former leave of absence which expired August 26, 1894, and for the further reason that she had failed to cultivate to crops any portion of said tract during the growing season immediately prior to making her said second application.

In your said office decision it is stated:

Section 3 of the act of March 2, 1889 (*supra*) contains a restriction that the leave granted shall be "for a period not exceeding one year at any one time." If the claimant in this case should receive a leave of absence for an additional year without first returning to the land, she would thereby receive a leave for a period of two years at one time, which would render the restriction referred to of no force.

Section 3 of the act of March 2, 1889, is as follows:

Whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such a settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

I am of the opinion that the language "not exceeding one year at any one time," in said section is a limitation upon the discretionary powers of the register and receiver, in granting application for leave of absence, fixing the maximum period for which they may, under the regulations of the Secretary of the Interior, grant a leave on the application, based upon the conditions named in said act and shown in the application, and is not a restriction or limitation upon the applicant, as the latter is limited by the conditions named in the act, viz: total or partial destruction of crops, sickness, or other unavoidable casualty;

rendering the settler unable to secure a support upon the land settled upon.

Therefore whenever it is made to appear to the register and receiver, that the conditions from which Congress sought to relieve the settler, exist, they are authorized to afford such relief as may be obtained by a temporary leave of absence from the land, subject to the limitation named in the act, viz, that they shall not grant a leave of absence for a longer period than one year "at any one time."

The word "whenever" in the first line in the section, and the phrase "at any one time" in the ninth line, clearly indicate that more than one application and more than one leave of absence was contemplated and authorized by the act. The act does not provide that any period of actual residence upon the land, shall intervene between the first and second or subsequent application.

This act is remedial, and designed to relieve the settler from certain well known climatic conditions and causes of misfortune for which the settler was not responsible and against which he could not guard, and is to be liberally construed with reference to the purpose of its enactment, thus carrying into effect the evident intent of Congress in accordance with the well known rules of construction applicable to remedial statutes.

See *Bechtel v. United States* 101 U. S. Rep. 597, citing *Sedgwick* 311, 513 and note.

See also *Sutherland on Statutory Construction* Par. 348 and 409.

This section has been discussed in the case of *Quein v. Lewis* 20 L. D., p. 19.

Under the facts in this case as disclosed in the affidavits for second leave of absence, I am of the opinion that the reasons upon which the register and receiver based their action are untenable, as to so hold, is to defeat in a measure the purpose and object of the leave, and nullify the act in question by requiring personal presence upon the land during the period for which leave has been granted.

The good faith of applicant is not questioned by the register and receiver or your office, and I am of the opinion that her application was made in good faith.

While the provisions of said section 3, will never be permitted to be invoked for the purpose of defeating the primary object of the settlement laws, and enable a settler to acquire title by residence and cultivation without residing upon and cultivating the land, yet I am of the opinion that whenever the conditions named in said section are made to appear to the register and receiver, the claimant should not be denied a leave of absence simply because no period of personal presence upon the land had intervened between the expiration of a former leave, and the application for a second or subsequent leave.

I am, therefore, of the opinion that the decision appealed from should be, and the same is accordingly reversed.

INDIAN LANDS—ALLOTMENTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., June 15, 1896.

To the Commissioner of the General Land Office, and the Commissioner of Indian Affairs.

GENTLEMEN: You are directed to be governed in the matter of Indian allotments by the following regulations.

Whenever an allotment is allowed under the fourth section of the act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), the action of the Office of Indian Affairs on said allotments shall be conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler upon said land and whether he was entitled, as an Indian, to make an allotment.

Where an application is made to enter a tract covered by an allotment, and the applicant claims settlement prior to the allottee a hearing may be ordered by the General Land Office.

Whenever an allegation is made that the allottee made the allotment for the benefit of another, such charge shall be heard by the General Land Office.

In all cases where an allegation is made that the land embraced in an allotment is not of the character contemplated by the allotment act, such charge shall be heard by the General Land Office.

HOKE SMITH,

Secretary of the Interior.

RIGHT OF WAY—APPROPRIATION OF WATER.

SURFACE CREEK DITCH AND RESERVOIR CO.

Questions involving the control and appropriation of the waters of a State cannot be adjudicated by the Department under an application for right of way privileges over the public land.

Acting Secretary Sims to the Commissioner of the General Land Office,
(J. I. P.) *June 16, 1896.* (A. M.)

On the 8th instant you submitted a certified copy of the articles of incorporation and the due proofs of organization of the Surface Creek Ditch and Reservoir Company, together with a map showing its seventeen reservoirs in the Montrose and Glenwood Springs land district, Colorado.

The reservoirs lie within the Battlement Mesa Forest Reservation and in accordance with the departmental requirement in such cases the

company has filed a specific agreement stipulating that it will not take, remove or destroy any timber from the lands within the reservation outside of the reservoirs. The company has also supplied a certificate that the right of way is desired for the sole purpose of irrigation.

These papers and the map are filed under sections 18 to 20 of the act of March 3, 1891 (26 Stat. 1095), and, being in the form required by the act and the regulations thereunder, are subject to favorable action.

Among the papers submitted is a protest by Benjamin S. Gheen against the application for right of way which, on examination, appears to be based on the allegation that in the use of the water the company is violating the laws of the State by failing to erect fishways in its dams and ditches and in excluding the public from fishing privileges, etc.

This is a matter involving the appropriation and control of the waters of the State and is one for the courts rather than for this Department to determine. It does not affect the right of way applied for and cannot be permitted to prevail against it.

The Department has ruled thus in case of *H. H. Sinclair et al.*, 18 L. D. 573.

In accordance with your recommendation the protest is therefore dismissed, the papers submitted are accepted and the map has been approved.

SURVEY—RIPARIAN RIGHTS—RIVER BED.

GEORGE W. SEBASTIAN ET AL.

The Department has no authority to order the survey of a former river bed lying between lands that have been finally disposed of by the government.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (J. L.)

With letter "E" of October 21, 1895, is transmitted your office decision of July 16, 1895, denying the applications of George W. Sebastian and William Deaton, respectively, for a survey of so much of the dry bed of Des Moines river, as lies contiguous to their lots of land in section 30, T. 78 N., R. 22 W., 5th principal meridian, Des Moines land district, Iowa.

Sebastian claims to be the owner of lot No. 12 containing 26.78 acres; says that P. W. Brown owns lot No. 1 containing 30.04 acres; and states that the river which formerly ran between these lots has gone dry, and that its former bed is now good agricultural land. Deaton claims to be the owner of lot 8 containing 50 acres; says that Jacob Bishop owns lot No. 7 containing 5.55 acres; and makes the same statement in respect to the river and river-bed between lots 7 and 8.

On July 16, 1895, your office rejected both of said applications. Deaton has not appealed; and Sebastian did not file his appeal until one day after the time prescribed by the rules of practice. Sebastian's

appeal is hereby dismissed. And your office decision must stand affirmed and final as to both parties.

Although this case is thus ended, in view of the fact that it is alleged in the applications, that "vexatious and expensive litigation will be avoided by a (governmental) survey of the old river-bed," it is proper for this Department to say, that your office decision is approved. Patents were issued by the United States for the lots above mentioned as follows: On April 10, 1850, to Ambrose Boatright for lot numbered one; on June 1, 1850, to Ezekiel Jennings for lots numbered eight and twelve; and on January 10, 1860, to the State of Iowa for the lot numbered seven. Each of said lots was bounded by the Des Moines river; and the lands covered by the waters of said river between said lots were, by said patents, disposed of by the United States, and ceased to be part of the public domain. The Land Department has no authority to cause a survey to be made of the "old river-bed."

SOUTH AND NORTH ALABAMA R. R. CO. v. HALL.

Motion for review of departmental decision of March 7, 1896, 22 L. D., 273, denied by Acting Secretary Reynolds, June 18, 1896.

MINING CLAIM—DESCRIPTION—NOTICE.

CANUCK LODE.

The field notes of survey, and application for patent, together with the notice, should correspondingly disclose with mathematical accuracy the amount of land included in a mining claim, and the acreage of the entry be determined accordingly. New publication of notice and posting thereof must be required where a mineral entry embraces land that was excluded from the claim in the notice on which such entry was allowed.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (P. J. C.)

It is shown by the record in this case that Frederick Schannel *et al.* made application for patent for the Canuck lode mining claim, mineral survey, No. 8704, in Pueblo, Colorado, land district, April 28, 1894. By the field notes and "application for patent" "lots No. 8214 May B. lode, 8286 Flower of the West lode, and 8523 Panther No. 2 lode" were expressly excluded, and by the field notes the "net area Cannuck lode" is 6.260 acres. The notice posted on the claim makes the same exclusions. The notices posted in the local office and published have the same exceptions, but this is added: "also excluding without waiver of rights conflict with survey No. 8710, Ray lode. Net area claimed 5.925 acres."

Entry under this application was made January 23, 1895, "expressly excepting and excluding," May B., Flower of the West and Panther No. 2, and the "Ray lode except that portion described," "containing 0.048 of an acre;" also part of survey 8733, Fulton lode, described by metes and bounds, "containing 0.0518 of an acre." Thus 0.048 of an acre of the Ray lode was added to the area claimed in the publication notice, and 0.0518 of an acre of the Fulton lode taken therefrom. The total area entered was 5.9212 acres. An informal examination of the records in your office, shows that the owners of the Ray lode before making entry, formally relinquished to the government that part of it included in the Canuck entry.

On this state of facts your office by letter of July 5, 1895, held:

As the entire conflict with the Ray claim was excluded from the published notice of the Canuck lode, no portion of said conflicting area can be included in entry unless publication is made therefor, under direction of the register and including posting on the claim and in the local office as provided by the statute.

Claimants were allowed sixty days in which to comply with this order, in default of which the entry would be canceled as to the conflict. Whereupon this appeal is prosecuted, and the errors assigned are (1) in requiring a new publication; (2) in not finding that the formal exclusion of the Ray was made without waiver of rights, and (3) that the publication discloses that the Canuck claimed the territory in conflict.

It will be observed that there is a variance in the acreage claimed in the field notes, the application for patent, and the final entry. In neither of them is the same amount of land stated. This of itself presents a loose and uncertain practice in obtaining title to public lands that should not be tolerated. Mathematical accuracy should be required as well in the amount of land applied for as in the *locus* of the claim itself.

In this case the plat and field notes make no mention of either the Ray or the Fulton lode. The survey as approved excludes the other three claims mentioned, and on the plat their locations relative to the Canuck are given. This is the record that is made of the Canuck in the land department, and is the basis, as it were, of the application, the publication, the entry and finally the patent. The surveyor-general in approving a survey cannot, of course, make any exclusions, except as shown by official surveys in his office, because his office has no official knowledge of any locations until application for survey has been made.

In this matter of conflicting locations there is an obligation resting on the applicant by which he can aid in having such a survey made as will correctly and definitely fix the area of his claim. If there are conflicts with his claim which he concedes to others, as in the Fulton exclusion, for instance, he should have so informed the surveyor and had it excepted. Applicants for patent for mining claims are presumed to know the surface conflicts that exist against their claim, and good faith on their part would seem to prompt them to make them

known, whether they have been officially surveyed or not, in order that, if the conflicts are conceded, they may be excepted from the survey. In this case both the Ray and the Fulton surveys were made subsequent to the Canuck, neither of them were excepted from the official survey of the Canuck, but the first was by the publication notice. It was, however, included in the entry, while the first mention of the Fulton is in the application to purchase and it is excluded from the entry. This system of procedure will necessarily result in interminable confusion and should not be encouraged.

But aside from this the Department concurs in your office decision that the conflict with the Ray lode was excepted from the publication notice.

The claim of counsel that the right of applicants was reserved is not tenable. The applicants should determine for themselves their rights, and proceed accordingly. If they are entitled to the land it should be included in all the papers. The owners of conflicting territory are amply protected by the statute, which gives them the right to settle the question of possessory title by adverse proceedings.

Since the intention of the applicants to apply for patent for the ground in conflict with the Ray was not advertised and posted, as required by law, your office judgment requiring new publication and posting must be affirmed.

The attention of your office is specially directed to exclusion of the Fulton lode, as shown by the receiver's receipt, with the suggestion that proper action be taken in regard to an amended survey of the Canuck. This matter seems to have been overlooked, when the case was considered in your office.

MINING CLAIM—PLACER PATENT—KNOWN LODGE.

VALLEY LODGE (ON REVIEW).

A patent may issue for a lode claim embraced in a prior placer patent on due showing by the lode claimant that he has acquired title to the conflicting placer ground, and that the lode was known to exist prior to the application for the placer patent.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (P. J. C.)

I have before me a motion for review of departmental decision of March 16, 1896 (22 L. D., 317), filed by counsel for the Bannister Mining Company, the present owner of the Valley Lode. It appears that one George Farlin made mineral entry No. 710 of the Valley Lode, lot No. 216, on October 24, 1881, in the Helena, Montana, land district. This entry was held for cancellation by your office December 27, 1894, to the extent of its conflict with the patented placer mineral entry No. 575, and the claimant was required to file an amended survey within

sixty days, in the absence of which the entry would be canceled. Further time was asked for and obtained by the present owner in which to comply with the order. On the showing made, however, your office under the doctrine of Pike's Peak Lode (10 L. D., 200) held the entry for cancellation. On appeal, the Department modified the action of your office under the rule in the South Star Lode (20 L. D., 204). It was held by the Department that there was no evidence before it that a known lode existed on the ground embraced within mineral entry No. 575 at the date of the application for patent therefor, and that the claimant should therefore make an application for a hearing within a reasonable time with a view of showing that a known lode did exist at that period.

The applicant now presents motion for review and modification of the order in the former judgment, alleging that the Bannister Mining Company is now the owner of both the placer ground and the Valley Lode, and certified copies of deeds are also presented showing the transfer to the company; that there being no persons upon whom to serve notice, and no other parties in interest except the government and the present owner, the judgment should be modified so as to permit the Bannister Company to receive patent for the ground claimed and held by it.

The showing made by this motion is not sufficient to warrant the Department in taking action prayed for. A certified abstract should be presented showing to the satisfaction of the Department that the company is now the owner of both of these parcels of land. Merely presenting copies of deeds is not sufficient to warrant the Department in assuming that there has been no subsequent transfer, or that the Bannister Mining Company is at the present time the owner of the ground in controversy. In addition to this, it seems to me that there must be some showing made that this lode was known to exist prior to the issuance of the placer patent, in order that the Land Department may have some record to justify itself in issuing a second patent for the same ground.

If a properly certified abstract is presented, showing the ownership of the land in the Bannister Mining Company, together with such evidence as will satisfy your office upon the point of the existence of the lode prior to the application for placer patent, I see no reason why the Valley Lode might not be passed to patent without any further proceeding. To this extent the departmental judgment of March 16, 1896, is modified.

MINING CLAIM—FIELD NOTES OF SURVEY CONNECTING LINE.

SULPHUR SPRINGS QUICKSILVER MINE.

The field notes of the survey of a mining claim should connect the claim with a corner of the public surveys, and in the absence of such connection, an amended survey and new notice of application will be required.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (E. B., Jr.)

The Merchants Exchange Bank of San Francisco, which made San Francisco, California, mineral entry No. 119, October 30, 1891, for the Sulphur Springs Quicksilver Mine, appeals from your office decision of April 20, 1895, requiring an amendment to the survey of the claim so as to show a connection with a corner of the public survey, and a republication and posting of the notice of application for patent.

The plat and field notes of the survey of the claim were approved by the surveyor general December 8, 1874, and application for patent and entry were made in 1875. This entry was canceled in 1881, because notice of the application was fatally defective, only having been published for fifty-six days, whereas the law required publication for sixty days. A new application was filed November 11, 1890, together with approved plat and field notes of the original survey. This survey, while making references to several large trees by courses and distances, does not connect the claim with any public survey corner.

It is important, however, to the applicant in this case, as well as to the government, that the survey of the claim give such a description, in the language of the statute (section 2325 R. S.), by "reference to natural objects or permanent monuments as shall identify the claim and furnish an accurate description, to be incorporated in the patent." The patent is the effective instrument whereby title passes from the government, is the muniment upon which all parties claiming thereunder should confidently rely, and its description of the property conveyed should be as accurate as is reasonably possible. The requirement of your office to that end, as to amendment of the survey, is in pursuance of the statute, and has formed part of the circular instructions and regulations of your office under the mining laws since January 14, 1867 (see fifth paragraph of circular of last mentioned date, also forty-third and forty-fifth paragraphs, respectively, of Mining Regulations of June 10, 1872, and December 10, 1891). This requirement should be complied with.

It is evidently the intendment of the law, as contained in the section already referred to, that the plat and field notes of the survey of a mining claim should constitute an essential part of the notice of the application for patent therefor. Unless this notice is full and accurate, thus affording a ready and sufficient means of ascertaining the precise boundaries of the claim, parties having adverse claims may be

misled to their serious and, possibly, irreparable loss, and so the beneficent purpose and end of notice would fail of attainment, and the notice instead of affording such parties protection might often become a snare.

The Department does not overlook the facts that the mine in question is old and well known, lies wholly within the northwest quarter of section 15, T. 27 S., R. 9 E., M. D. M., and that its location is shown upon the plat of the public survey of the township, approved November 27, 1867, and appears to be substantially identical with the existing location made in 1872, and that the notice given appears to conform in all respects with the requirements of law, except that it describes no line of survey connecting the claim with a public survey corner.

The requirement that a mining claim on or near surveyed land must be connected by a line of survey with a public survey corner, as has already been pointed out, is one of long standing. The Department finds no warrant to direct a waiver of the requirement in the present instance.

Your office decision is accordingly affirmed, both as to an amended survey and the giving of new notice.

GIBSON ET AL. v. LASCY.

Motion for review of departmental decision of February 4, 1896, 22 L. D., 88, denied by Acting Secretary Reynolds, June 18, 1896.

HOMESTEAD—RESIDENCE—LEAVE OF ABSENCE.

ADELE C. LEONARD.

Poverty and inability to earn a living on the land is not a "casualty" that entitles a homesteader to leave of absence under section 3, act of March 2, 1889.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (R. F. H.)

Adele C. Leonard appeals from your office decision of February 25, 1895, rejecting her second application for leave of absence from her homestead entry No. 15722, made November 15, 1893, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 26, T. 30 N., R. 7 W., Seattle land district, Washington, on the ground that poverty and inability to earn a support on the land was not a "casualty" within the meaning of section 3 of the act of March 2, 1889 (25 Stat., 854).

It was held in the case of Harry C. Seward (11 L. D., 631) that the leave of absence accorded a settler under section 3 of said act can only be allowed by reason of sickness, failure of crops, or other unavoidable casualty, and that failure to obtain water at a depth of thirty-six feet was not a "casualty" within the meaning of said act. See also the case of John Riley, 20 L. D., 21. Casualty is defined to be an acci-

dent; that which comes by chance, or without design, or without being foreseen.

In the case of *Thompson v. Tillotson* (56 Mis., 36) the court in passing upon the construction of the words "casualty or necessity," in Sec. 2144 of the Code of 1871, which provided that "whenever the debtor shall cease to reside upon his homestead, it shall be liable for his debts, unless his removal be temporary, by reason of some casualty or necessity" said, "the word casualty evidently refers to some sad accident, as fire or flood or some social or family disaster or misfortune."

While it is true that section 3 of said act was remedial, and the language is entitled to a liberal construction, yet if Congress had intended to make poverty a sufficient cause for a leave of absence it would hardly have used the word casualty to convey its meaning. It is more reasonable to conclude that Congress, having knowledge of the departmental rulings that temporary absence on account of poverty, or for the purpose of earning a support and making improvements or payment for the land, were not inconsistent with good faith, and were not regarded as an abandonment of the land, but were excused, and the claimant in such cases was regarded as constructively residing upon the land, did not design to make any provision for such absences, but leave the parties where the decisions of the Department left them, and that their absences in such cases would be passed upon upon their merits when the applicant offered his final proof.

No good reason appearing for reversing or in any manner modifying said decision appealed from, the same is accordingly affirmed.

HOMESTEAD—COMMUTATION—ACT OF JUNE 3, 1896.

EAMES v. BOURKE.

Under the act of June 3, 1896, a commuted homestead entry, suspended on account of having been made prior to fourteen months residence after date of the original entry, is confirmed, where it appears that the entryman in good faith actually resided six months on the land prior to commutation, and no adverse claim, originating prior to final proof, exists.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (P. J. C.)

There has been filed by counsel for Michael J. Bourke a petition for re-review of departmental decision of August 17, 1894, wherein was denied a motion for review of decision of February 19, 1894 (18 L. D., 150), rejecting the final commutation proof of Bourke, made February 15, 1892, on his homestead entry, made January 4, 1892, for the NE. $\frac{1}{4}$ Sec. 15, T. 47 N., R. 40 W., Marquette, Michigan, land district.

The original decision held that,

the original entry of Bourke was made January 4, 1892, subsequently to the passage of the act of March 3, 1891, and consequently is governed by that act. The meaning of the amended section is too plain for controversy. The language is: "fourteen months after the date of entry," not after settlement.

A motion for review of this judgment was overruled, and the present petition asks a re-review of these decisions.

In view of recent legislation by Congress which controls the issue in this case, it is not deemed necessary to set forth the grounds of this petition, or discuss the questions raised thereby. It is only required to state such facts as are pertinent now, with the view of ascertaining if the matters involved come within the terms of the act of Congress. Bourke in his final proof swears that he built his house on the land in December, 1889, "and established actual residence January 24, 1890."

The present controversy arose in this way: On April 9, 1892, George B. Eames applied to contest Bourke's entry on the ground that the commutation proof and entry were illegal, in that it was made under Sec. 2301 of the Revised Statutes.

Your office, by letter of April 30, 1892, declined to order a hearing, for the reason that there was no charge affecting the validity of the entry, "nor does it charge fraud or bad faith on the part of the entryman." Your office decided that the proof was prematurely made; held the final certificate for cancellation, keeping the entry intact to permit the entryman to submit commutation proof at the proper time. On motion for review, that judgment was modified "by revoking the order of cancellation, and instead thereof, order that Bourke's final certificate and proof be held suspended until the expiration of fourteen months from date of his entry," when he might submit supplemental proof. An appeal brought the case to the Department, and your office judgment was affirmed (18 L. D., 150).

By act of Congress of June 3, 1896 (Public No. 173), it is provided:

That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificate of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs, and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled when the lands made vacant by such cancellation have been reentered under the homestead act.

SEC. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement.

In the entry under consideration no fraud is apparent in making the final proof; there are no adverse claims to the land in controversy that originated prior to final proof; there is no reason shown to the Depart-

ment why title should not invest in the entryman "except that the commutation was made less than fourteen months from the date of homestead settlement," and on the face of the record it is shown that the entryman in good faith actually resided six months on the land prior to commutation. It is also apparent that the commutation allowed in this case was "after the expiration of fourteen months from date of settlement."

It is clear, therefore, that under the provisions of this act, the entry of Bourke is confirmed, and the same should pass to patent, if otherwise satisfactory.

It is so ordered, and the former decisions suspending the entry are hereby revoked.

YOUNG *v.* SEVERY ET AL.

Motion for review of departmental decision of February 10, 1896, 22 L. D., 121, and application for rehearing denied by Acting Secretary Reynolds June 18, 1896.

TIMBER LAND ENTRY—APPLICATION—PRELIMINARY AFFIDAVIT.

STURM *v.* TAYLOR.

An application to enter land under the timber and stone law may be properly rejected, if the preliminary affidavit does not show that the applicant has personally examined the land.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
June 18, 1896. (G. C. R.)

The homestead entry of William Taylor, made July 27, 1892, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 58 N., R. 20 W., Duluth, Minnesota, was canceled on January 5, 1895, on a contest brought by Frances A. Regan.

On January 8, 1895, Lydia K. Sturm applied to purchase the land under the timber and stone act of June 3, 1878 (20 Stat., 89).

On January 28, 1895, Frances A. Regan executed and acknowledged an instrument in writing, waiving her preference right of entry under her contest, and on the same day Alexander Taylor made application to enter. The same was allowed by the register, who, at the same time, rejected Miss Sturm's application, for the reason that she failed to state that she had personally examined the land.

Your office decision of May 22, 1895, affirmed that action, and a further appeal brings the case here.

The principal question raised in this appeal is, whether one who files a preliminary affidavit, with a view to enter land under the timber and stone act, is required to state in such affidavit that he or she has personal knowledge of the facts therein set forth; and whether on failure to show such personal knowledge, the land is subject to entry by another and subsequent applicant.

Among other requirements imposed by said act, it is provided in the second section thereof that a person desiring to avail himself of its provisions shall file with the register "a written statement," to be verified by the oath of the applicant, stating, among other things, that the land is unfit for cultivation and valuable chiefly for its timber and stone, and is uninhabited, and contains no mining or other improvements. This oath must be made by the applicant, and, therefore, must be upon his or her personal knowledge. L. M. Walker, 11 L. D., 599.

Miss Sturm only stated that she had "*had*" the land examined, and from the knowledge "thus obtained" made her statement. This did not meet the plain requirements of the statute, and the register was authorized to reject her application.

Although Miss Sturm's statement made upon information and belief was afterwards corroborated by witnesses, who swore that they had personal knowledge of the land, yet these affidavits were made subsequent to Taylor's entry, and after her application had been rejected. She has no valid grounds for complaining.

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The provisions of said section are applicable to an entry of Mille Lac Indian lands made under the general laws prior to July 4, 1884

The purchaser of a soldier's additional homestead right is entitled to the benefit of the confirmatory provisions of said section

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* For "material," in sixth line from bottom of p. 679, read *immaterial*.

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